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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

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MCDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

**BILLY G. GREENWOOD, a minor child, by
his parents and natural guardians,
JOHN G. GREENWOOD and FRED A GREENWOOD,
JOHN G. GREENWOOD, individually; and
FRED A GREENWOOD, individually,**

Respondents.

=====

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

The petitioner, McDonough Power Equipment Company, Inc.,* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 3, 1982 on the following issues:

1. Whether the Court of Appeals erred in setting aside a jury verdict without any finding of error by the trial court, and without any evidence in the record of juror misconduct resulting in bias and prejudice to the appellant.

2. Whether the Court of Appeals erred in ordering a new trial and refusing to remand the case to the district court for determination of facts relevant to the grounds for a new trial.

PARTIES

*Since the trial of this case, Petitioner's corporate identity has changed. Petitioner is now the Snapper Power Equipment Division of Fuqua Industries, Inc., a Delaware corporation.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reproduced in the appendix at A-1. The opinion is reported at 687 F.2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 3, 1982. A timely petition for rehearing was filed on September 14, 1982. The petition for rehearing was denied on October 4, 1982. This petition has been filed within sixty (60) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1976).

I. STATEMENT OF THE CASE

This is a personal injury products liability action involving an allegedly defective riding lawnmower. The three year old plaintiff was injured while playing with other children in a neighbor's yard, without parental supervision. The neighbor's twelve year old son was operating a riding lawnmower manufactured by defendant McDonough Power Equipment Company, Inc. at the time of the accident, likewise without parental supervision. Plaintiff's nine year old brother was seated on the operator's lap at the time of the accident.

Subject matter jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. Section 1332. The case was tried in the U.S. District Court for the District of Kansas, sitting at Topeka, between April 4 and April 25, 1980. The jury returned a special verdict in accordance with the substantive law of the State of Kansas, where the accident occurred. The jury found no liability for the defendant manufacturer. The jury also found plaintiff's damages in the amount of \$375,000.00.

In accordance with the special verdict, the Court entered judgment in favor of the defendant manufacturer. Plaintiff filed a timely motion for new trial, alleging eighteen grounds. The eighteenth ground alleged involved the Court's refusal to permit interrogation of the jurors by plaintiff's counsel, who sought to obtain evidence of juror misconduct. The remaining grounds involved issues that had previously been ruled upon by the Court. Plaintiff's motion for a new trial was ultimately denied, and plaintiff appealed.

The U.S. Court of Appeals for the Tenth Circuit ordered a new trial, based upon the alleged misconduct of juror Ronald Payton. Payton allegedly failed to reveal significant information requested by plaintiff's counsel during voir dire. Defendant denied that Payton had failed to reveal significant information, and further denied that plaintiff had made any showing to the Court that Payton or any other juror was biased. The Court of Appeals held that plaintiff's allegations were sufficient to require a new trial.

The trial judge never held that juror Payton had concealed significant information, or that he was biased or prejudiced. The Court of Appeals did not hold that the trial judge abused his discretion in denying the motion for a new trial. The Court of Appeals made a de novo determination on the question of juror misconduct, based on allegations that had never been substantiated at the trial level. The Court of Appeals held that comments made by juror Payton during a discussion with counsel subsequent to trial supported the contention of misconduct. The contents of this conversation were never reported to the trial judge, and were never made a part of the district court record. Plaintiff's counsel had been

granted permission to approach juror Payton for the purpose of obtaining support for his motion for a new trial. Because the results of the interview were not reported to the trial judge, that information had no influence on the decision to deny the motion.

The specific act of misconduct alleged was the failure of juror Payton to respond to a question asked by plaintiff's counsel:

Now, now many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

After the trial, plaintiff's father submitted an affidavit alleging that juror Payton's son had suffered a broken leg caused by the accidental separation of a truck wheel. The trial judge granted leave to contact Mr. Payton and questioned him concerning the allegations. The trial judge described his understanding of the issue to be resolved in the following terms:

Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side.

Permission to interview juror Payton was granted on May 5, 1980. Payton was interviewed by telephone the same day.

Payton confirmed that his son had suffered a broken leg under the circumstances alleged, but explained that no disability or prolonged pain had resulted. Plaintiff's counsel made no arrangements either to tape the interview or to have a stenographic transcript made. When the results of the interview were ultimately described in appellate briefs, each counsel relied upon his own telephone notes and personal recollection of the interview. Needless to say, counsel's versions of the information imparted by Mr. Payton differed significantly. Counsel for defendant's recollection of the interview was that Payton confirmed the truthfulness and completeness of his answers during voir dire.

Two of the three members of the Court of Appeals panel considered plaintiff's counsel's report of the interview sufficient grounds to order a new trial of the entire case. The third member of the panel dissented, arguing that the most plaintiff was entitled to was a hearing before the district court judge for the purpose of

making factual determinations on the allegations of misconduct. This panel member also voted to grant defendant's motion for rehearing and submit the appeal to the Tenth Circuit.

II. REASONS FOR GRANTING THE PETITION

1. The Court of Appeals has so far Departed from the Usual and Accepted Course of Judicial Proceedings that this Court Must Exercise its Powers of Supervision.

The Court of Appeals held that the district court's judgment based on a jury verdict should be reversed, and a new trial should be ordered, based upon allegations that a juror had failed to respond to a question on voir dire. Counsel for plaintiff contended that the juror's omission deprived him of the exercise of his right of peremptory challenge. The trial judge denied a motion for new trial based in part upon this allegation. At the time the motion for new trial was denied, no evidence had been presented to indicate that any juror had failed to respond accurately and truthfully to every question asked during voir dire.

On appeal, counsel for plaintiff presented arguments based on facts never presented to the trial court. Juror Payton was alleged to have made comments during a telephone conversation with counsel which were alleged to give some indication of partiality. The Court of Appeals held that this conversation did present evidence of partiality, and ordered a new trial on that basis. At no point did the Court of Appeals hold that the district judge abused his discretion in denying the motion for new trial on the record

presented to him. Neither did the Court of Appeals hold that the trial judge committed any other error. The Court of Appeals treated the plaintiff's appeal brief as a renewed motion for a new trial, and determined that motion de novo based on the unsupported allegations contained in the briefs.

The Court of Appeals failed to follow the rule of law stated in its own opinion, as was pointed out by the dissenting member of the panel. The case was decided upon the principles of law set forth in Photostat Corporation v. Ball, 338 F.2d 783 (10th Cir. 1964), which were stated in the following terms:

Under Photostat, the failure of a juror to fully and truthfully answer questions propounded to the panel is deemed reversible error upon a showing of probable bias of the juror with consequential prejudice to the unsuccessful litigant. The withholding of insignificant or trifling information indicative of only a remote or speculative influence on the jurors not being prejudicial. A new trial is required, however, if the suppressed information is of 'sufficient cogency and significance' to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. (Appendix A-8, A-9).

Under this test, the party alleging juror misconduct must prove (1) the juror has failed to fully and truthfully answer a question, (2) the juror is biased against the complaining party, (3) the bias of the juror resulted in prejudice during the jury's deliberations.

The trial court found none of the three factors to be supported by any evidence. The opinion of the Court of Appeals baldly states that the facts relied upon by it in determining these factors nowhere appear in the trial record. See Appendix A-6, A-7. As the dissenting opinion of Justice Barrett points out, neither the record nor arguments of counsel supports any finding that the juror was biased against the plaintiff, or that his alleged bias in any way influenced the jury's verdict. The dissenting opinion correctly points out that the most that could be found, even from the allegations in plaintiff's brief, was that the juror failed to answer a question fully.

Plaintiff wholly failed to present to the district court any basis to warrant the granting of a new trial. Even the contentions made on appeal were insufficient to support the granting of a new trial. Neither at the district court level nor in the Court of Appeals was any evidence, or any argument, presented to show how juror Payton could have been biased against the plaintiff, or how his alleged bias could have worked to the prejudice of the plaintiff. Under these circumstances, the Court of Appeals unquestionably abused its discretion in ordering a new trial.

Only the Supreme Court of the United States can maintain discipline over the various Circuit Courts of Appeal. Where a Circuit Court of Appeals oversteps its authority, and usurps the authority of the district court rather than exercising review over that court, this Court is required to exercise its powers of supervision. The decision rendered by the Court of Appeals in this Court is without parallel in any other reported decision. The defendant was entitled to a trial by jury under the provisions of the

Seventh Amendment to the United States Constitution. If the Courts of Appeal are permitted to grant arbitrary indulgences to selected appellants, outside the boundaries of accepted principles of appellate review, jury verdicts will be rendered meaningless. The opportunity for abuse of discretion is vast. If a Court of Appeals were permitted to grant new trials on behalf of favorite appellants without regard to principles of law, and to deny new trials where the verdict favors the party in sympathy, the legal process would be reduced to a game of chance.

The decision in the present case need only be compared with its mirror-image opposite to illustrate the potential for abuse. This Court was recently asked to review the decision of the U.S. Court of Appeals for the Fourth Circuit in Michelin Tire Corporation, et al. v. Fallaw, (4th Cir. unpublished) Petition No. 82-266 in the October term, 1982 of this Court. In that case, a judgment in favor of plaintiffs was entered on a jury verdict at the trial level. Defendants requested a new trial based on allegations that jurors had failed to respond fully and truthfully to questions during voir dire. The trial court held a hearing, and determined that the jurors' omissions were innocent, indicated no bias, and resulted in no prejudice. The Court of Appeals affirmed the trial court's exercise of its inherent discretion. This Court declined to exercise its jurisdiction on petition for certiorari.

The present case is distinguishable from the Fallaw case only on points that are favorable to this petitioner. If this petition is denied, lower courts will be free to render totally opposed decisions on indistinguishable fact

situations. The rules of law were adhered to, and due process followed, in the Fallow case, as this Court recognized. Yet the exact same rules of law have ostensibly been applied in the present case, with a result which bears no resemblance to that of Fallow.

A recent decision of the Supreme Court of California further illustrates the temptations confronting appellate courts with unnecessarily broad discretion in granting or denying new trials. In Hasson v. Ford Motor Company, 185 Cal.Rptr 654 (1982), the defendant appealed an adverse verdict in the second trial of the same case. An earlier appeal by Ford resulted in the new trial. The Supreme Court of California admitted that serious juror misconduct occurred during the second trial, but refused to grant a new trial for basic reasons of "equity":

This plaintiff was seriously and permanently injured in 1970. He has prevailed in two lengthy jury trials, but for twelve years has received no recovery. Justice will not be served by a second reversal, yet another lengthy trial, to be followed in all likelihood by further appeals. 185 Cal.Rptr. at 673.

The United States Courts of Appeal certainly are no less prone to human sentiments than the California Supreme Court. If the Courts of Appeal are permitted to "bend" the rules of appellate review to grant new trials to sympathetic parties, and deny new trials where the result would be unfavorable to a sympathetic party, that ability will undoubtedly be used at some time or other. Every party is, however, entitled to equal protection of the law, including the right to a

judgment in accordance with a jury's verdict rendered after a fair trial. Even a single instance of "bending" the rules is too many. This Court should therefore intervene to reimpose the discipline of law in the present case.

2. There is a Conflict Among Circuits Concerning the Standard for Granting a New Trial Based on Allegations of Juror Misconduct During Voir Dire.

The Court of Appeals applied a standard for determining juror misconduct which is drastically at variance with the standard applied by every other circuit which has addressed the issue. The Court of Appeals found juror misconduct, as a matter of law, based solely upon an allegation that a juror failed to reveal information during voir dire which might have been material to the exercise of peremptory challenges by plaintiff's counsel. The Court of Appeals required no showing of juror bias, or resulting prejudice to the plaintiff. The Court of Appeals further rejected the defendant's contention that the record affirmatively showed the information allegedly withheld to be immaterial, based on the conduct of plaintiff's counsel. The Court of Appeals therefore engaged in an irrebuttable presumption that even an innocent failure to reveal potentially material information on the part of a juror requires a new trial.

Every other circuit Court of Appeals which has addressed this question has determined that the complaining party must affirmatively show not only a significant omission by the juror, but also must show juror bias against the complaining party and actual prejudice during jury deliberations, in

order to require a new trial. See, for example, Vezina v. Theriot Marine Service, Inc., 554 F.2d 654, after remand 610 F.2d 251 (5th Cir. 1980); Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981); McCoy v. Goldstein, 652 F.2d 654 (6th Cir. 1981); Christian v. Hertz Corporation, 313 F.2d 174 (7th Cir. 1963); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979); Johnson v. Hill, 274 F.2d 110 (8th Cir. 1960).

The ruling embodied in these cases is eminently sensible. A new trial should not be ordered if the juror was never asked to reveal the information that allegedly would have resulted in his peremptory challenge. Some showing that the juror has withheld information sought by counsel is therefore reasonable and necessary. The requirements of a showing of bias and prejudice are mandated by F.R.C.P. 61, relating to harmless error. If the juror's failure to disclose information is evidence of a bias in favor of the complaining party, obviously no new trial should be granted. Similarly, if the bias of the juror has no effect whatever on the outcome of the jury's deliberations, a new trial should not be granted. These factors were considered in the dissenting opinion of Justice Barrett in the present case, who pointed out that the only alleged bias would have gone to the amount of plaintiff's damages, rather than the defendant's liability.

The refusal of the Court of Appeals to examine the manner in which plaintiff's counsel used peremptory challenges at trial is contrary both to good sense and to the practice in other circuits. Two jurors revealed information about themselves of the same kind and quality as that allegedly withheld by juror Payton. Neither juror was challenged. There can be no better evidence

that the information allegedly withheld by juror Payton was immaterial to the issues to be tried. If the information was immaterial, Payton's failure to reveal it and the Court's refusal to order a new trial are harmless. The manner in which counsel has in fact exercised peremptory challenges is considered relevant in the Eighth Circuit. In McCoy v. Goldstein, *supra*, it was held that if plaintiff had shown sufficient grounds for an evidentiary hearing on alleged deprivation of the right of peremptory challenge, based in part upon the fact that plaintiff's counsel had challenged a juror who revealed facts similar to those withheld by another juror. See 652 F.2d at 659. If a motion for new trial based on juror misconduct during voir dire can be supported by counsel's conduct in exercising peremptory challenges, certainly basic due process requires that same information be taken into consideration when the movant's allegations are rebutted rather than supported.

Counsel for the petitioner hesitates to interject information from outside the record into this Petition, but feels that this course is necessary to convince the Court of the equity of its position. Subsequent to the refusal of the Court of Appeals to rehear this case, counsel for plaintiff stated to counsel for petitioner that he never had any intention of challenging juror Payton, and would not have challenged him even if all of his post-trial disclosures were known at the time the jury was selected. Counsel for plaintiff related that he knew juror Payton to be employed as a butcher in the city of Emporia, Kansas. Counsel for plaintiff stated that he assumed juror Payton would have some awareness that counsel for plaintiff had represented the Butcher's Union Local for the City of Emporia, and would therefore tend to favor the plaintiff in

this case. Counsel for plaintiff stated that he knowingly and intentionally limited his examination of juror Payton, to avoid revealing this information to counsel for petitioner and thereby risking the exclusion of juror Payton. Because this information was not revealed to counsel until after the motion for rehearing was denied, it has not previously been submitted to any court. This information is submitted to this Court reluctantly, in the hope that it will move the Court to a realization of the injustice committed in the present case, and the arbitrary results which can be achieved if the procedures followed by the Court of Appeals are allowed to stand unchallenged.

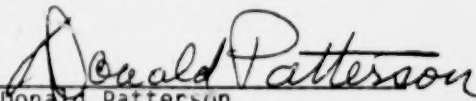
Every circuit except the Tenth Circuit requires a positive showing to the trial court of all three elements of juror misconduct, if a new trial is to be obtained. Only the Tenth Circuit refuses to permit the trial court to exercise its discretion and to make findings of fact. Only the Tenth Circuit requires a new trial where the complaining party has not been prejudiced. Only the Tenth Circuit refuses to consider facts in the record in determining the extent to which the rights of the complaining party may have been prejudiced. The proper remedy in this case is that provided by the majority of the circuits, and recommended by the dissenting Justice in the Court of Appeals. The decision of the trial court should either be affirmed, or the case should be remanded for the limited purpose of a hearing to inquire about the alleged misconduct of juror Payton, and a determination by the trial court of the existence of any bias on Payton's part. The trial court, in the event of a remand, should be entitled to view all of the facts relevant to plaintiff's claim of deprivation of his right to a fair trial. The trial court should be permitted


to consider the conduct of counsel on the record, and counsel's public pronouncements, in determining whether plaintiff was deprived of a right to a trial by jury.

III. CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

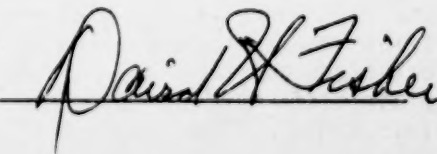

Donald Patterson


Steve R. Fabert
Counsel for Petitioner

IV. CERTIFICATE OF SERVICE

I, the undersigned, certify that I deposited three copies of the foregoing in the United States mail, postage prepaid, on the 1st day of December, 1982, addressed as follows:

Gene E. Schroer and Dan L. Wulz, JONES,
SCHROER, RICE, BRYAN & LYKINS, 115 E. 7th,
Topeka, Kansas 66603.



42.

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

SEP 03 1982

HOWARD K. PHILLIPS
Clerk

PUBLISH

No. 80-1698

Donald Patterson (Steve R. Fabert with him on the brief) of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellee.

Before BARRETT and MCKAY, Circuit Judges, and BRIMMER, District Judge.*

McKAY, Circuit Judge.

*Chief Judge of the United States District Court for the District of Wyoming, sitting by designation.

Billy G. Greenwood and his parents, John and Freda Greenwood, appeal from an adverse jury verdict and related judgment in a products liability action predicated upon strict liability. Jurisdiction rests upon diversity of citizenship. The facts will be discussed only insofar as relevant for purposes of our decision.

On May 25, 1976, Jeff Morris, thirteen years of age, was mowing the Morris yard on a riding mower manufactured by appellee, McDonough Power Equipment, Inc., pursuant to his father's instructions. Jeff had previously operated the mower approximately thirty hours over a three- to four-year period.

On this particular day, Troy Greenwood, Billy's older brother, was riding on the mower with Jeff. The Morris and Greenwoods were next-door neighbors. While operating the mower, Jeff watched the left front wheel to make certain that he was getting an even cut. Jeff was aware that Billy, two years of age, and several other children, were playing at and around a swingset in the back yard, approximately 25 feet from the area where he was mowing.

While Jeff was mowing the yard, Billy, undetected by Jeff, approached the mower to pick up a doll in the path of the mower. Immediately prior to the accident, Jeff, upon realizing that Billy was in the path of the mower, shouted "watch out." Fearing that he could not stop in time, Jeff turned the mower to the right to avoid hitting Billy. During the course of the turn, the left front tire of the mower went over Billy's left foot. Billy subsequently kicked

at the mower with his right foot but both feet went under the mower where they contacted the mower blade, resulting in the loss of both feet.

At the time of the accident, Freda Greenwood was in her home doing housework. Although she was aware that Troy and Billy were playing in the Morris yard, she was unaware that Jeff was mowing the yard until Troy notified her of the accident.

In their complaint, the Greenwoods alleged that: the mower was of defective design and workmanship, and negligently constructed; the defects of the mower were hidden and latent and could not be discovered by general observation or superficial examination; the defects were due to McDonough's negligence; the mower was not fit for its intended purpose; Billy sustained permanent disability; and that they, as Billy's parents, sustained severe emotional shock and damages.

In its answer, McDonough denied that the mower was negligently or improperly designed or that it was unfit for its intended use. McDonough also alleged that Billy's injuries were caused by the combined negligence of Ira Morris (Jeff's father), as the owner of the mower, Jeff Morris, as the operator of the mower, and John and Freda Greenwood, as the persons responsible for Billy's supervision.

Following several pretrial motions, the case proceeded to trial on the basis of strict liability. The Greenwoods alleged that the mower was defective in that: the blade was below the deck of the

mower; the blade bar, as manufactured, was not within McDonough's manufacturing tolerances thus causing the blade level to be below the deck, aggravating the injury to the left foot; the blade was improperly designed; the blade brake-clutch was defectively designed because it did not provide a deadman control for stopping, and because of its lack of durability.

The trial extended over a three-week period. McDonough's defense throughout trial was that the mower was not defectively designed and that the combined negligence of the Morrises and Greenwoods gave rise to the accident and consequent injuries sustained by Billy. The jury, in accordance with Kansas law, was allowed to compare the fault of McDonough, Jeff Morris, Ira Morris, and Freda Greenwood. See Kan. Stat. Ann. § 60-258a (1976). The jury returned a verdict finding McDonough 0% at fault, Jeff Morris 20% at fault, Ira Morris 45% at fault, and Freda Greenwood 35% at fault. The jury assessed damages at \$0.00. Upon being instructed by the trial court that, inasmuch as Billy had lost both feet he had definitely suffered some damages, the jury reconvened for further deliberations and found that Billy had been damaged in the amount of \$375,000.00. The district court thereafter entered judgment that Billy take nothing, that the action be dismissed on the merits, and that McDonough recover its costs.

The Greenwoods contend the district court erred in denying their motion to approach the jurors and in denying leave to subpoena the jurors to give testimony at the hearing on their motion for a

new trial. They also contend they are entitled to a new trial because their right to peremptory challenge was impaired.

The judgment in favor of McDonough was entered on April 25, 1980. On April 29, 1980, the Greenwoods filed a motion to approach the jurors contending that "plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions." Record, vol. 2, at 325.

The Greenwoods' attorney, in his voir dire, had asked the prospective jurors:

Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

Record, vol. 21, at 39. One juror answered affirmatively, and after additional questioning by Greenwoods' attorney as to his impartiality, was allowed to remain on the jury. Mr. Payton did not respond.

On April 30, 1980, the district court entered a memorandum and order denying the Greenwoods' motion to approach the jurors. The district court summarized its denial of the motion by observing that interviews of jurors by persons connected with a case are not favored except in extreme situations, citing Stein v. New York, 346 U.S. 156 (1953), and McDonald v. Pless, 238 U.S. 264 (1915). The district court also adopted, by appending, Silkwood v. Kerr-McGee

Corp., 485 F. Supp. 566 (W.D. Okl. 1979), declaring it "controlling here."

On May 1, 1980, the Greenwoods filed a second motion to approach the jurors which states:

Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had ever been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Record, vol. 2, at 345. On May 5, 1980, the district court entered an order granting, in part, the Greenwoods' second motion:

Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.

The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.

Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Record, vol. 2, at 348.

Counsel for both parties subsequently arranged for a conference call interview with juror Payton. During the course of the

interview, which was not preserved as part of the record herein, juror Payton related that his son had received a broken leg as the result of an exploding tire. According to counsel for the Greenwoods, Payton related that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life," and that "all his children have been involved in accidents." Appellants' Brief at 7. According to McDonough's counsel, Payton "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering'. As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent." Appellee's Brief at 18.

Both parties cite Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964), in support of their respective positions that Mr. Payton's failure to disclose his son's accident during voir dire did, or did not, prejudice the Greenwoods' right of peremptory challenge.

In Photostat we held that when four prospective jurors in a negligence case arising out of an automobile accident withheld information as to their personal involvement in accidents with resulting claims, for which they were paid, a defendant was entitled to a new trial because of the prejudice to his right of peremptory challenge, even assuming that the jurors had good intentions and were not disqualified for cause. In Photostat we observed:

In Consolidated Gas and Equipment Company of America v. Carver, 10 Cir., 257 F.2d 111, we recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected. See also Crutcher v. Hicks (Ky.), 257 S.W.2d 539, 38 A.L.R. 2d 620.

The prospective juror in Consolidated Gas and Equipment Company of America v. Carver, supra, was then a plaintiff in a state court suit for actual and exemplary damages. And, the suit in which he was a plaintiff and the one in which he was a prospective juror "bore marks of similarity". In these circumstances we were of the view that if the juror had disclosed the pendency of his action in the state court, he would have been excused for cause, and if not for cause, the defendant would have exercised one of his peremptory challenges; that "whether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency." And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right." Id. p. 115.

In this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right.

338 F.2d at 786-87 (emphasis added).

Under Photostat, the failure of a juror to fully and truthfully answer questions propounded to the panel is deemed reversible error upon a showing of probable bias of the juror with consequential

prejudice to the unsuccessful litigant. The withholding of insignificant or trifling information indicative of only a remote or speculative influence on the juror is not deemed prejudicial. A new trial is required, however, if the suppressed information is of "sufficient cogency and significance" to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. Id. at 787.

Applying these standards, we hold that juror Payton's failure to answer the question posed on voir dire prejudiced the Greenwoods' right to peremptory challenge, thus necessitating a new trial. We think the unrevealed information was of "sufficient cogency and significance" that the Greenwoods' counsel was entitled to know of it in deciding how to use his peremptory challenges.^{1/} The test is an objective one: the fact that the juror failed to disclose

1. McDonough argues that Mr. Payton probably would not have been peremptorily challenged and therefore plaintiffs were not prejudiced. It bases this contention on the fact that two other prospective jurors responded that members of their family had been injured, and after further questioning by plaintiffs' counsel, were allowed to remain on the jury. We agree with plaintiffs that this argument has no merit, since "[t]he test is whether counsel was entitled to know the suppressed information, not whether counsel might have, would have, or probably would have acted on the information." Appellants' Reply Brief at 12; see Photostat Corp. v. Ball, 338 F.2d 783, 787 (10th Cir. 1964). An inquiry based on whether counsel would have challenged the juror would be unworkable. Not every suspicious answer to a voir dire question leads to a peremptory challenge. Rather, counsel must exercise his intuitive judgment about the prospective juror based not only on what the juror says but also on non-verbal cues indicative of the juror's mental attitude toward the merits of the case and the parties. This opportunity to judge the character and attitudes of the prospective juror may persuade counsel that the juror is capable of fairly and impartially deciding the client's cause despite the giving of an answer indicative of possible bias. It is the opportunity to assess the prospective juror that is important, not whether the juror ultimately is challenged as a result of the opportunity.

important information unintentionally, or as a result of a misunderstanding of the voir dire question, does not foreclose the conclusion that the right to peremptory challenge was substantially impaired. Id. at 785, 787. The unrevealed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury. The prejudice to the Greenwoods was exacerbated by the fact that Mr. Payton became the jury foreman. We accept as true that Mr. Payton did not intentionally conceal the information and held a good-faith belief that his son's injury was not a serious one resulting in disability or prolonged pain and suffering. Good faith, however, is irrelevant to our inquiry. Id. at 785. If an average prospective juror would have disclosed the information, and that information would have been significant and cogent evidence of the juror's probable bias, a new trial is required to rectify the failure to disclose it. These conditions were met here.

We therefore reverse and remand this case to afford plaintiffs the opportunity to select a new jury and present their evidence in a new trial.^{2/}

REVERSED AND REMANDED.

2. We emphasize that plaintiffs' cause of action is not a groundless one. The district court found plaintiffs' evidence sufficiently substantial to justify submission of their theory of liability to the jury. We are therefore satisfied that our remand for a new trial is not an exercise in futility.

No. 80-1698 - BILLY G. GREENWOOD, et al. v. McDONOUGH POWER EQUIPMENT, INC.

BARRETT, Circuit Judge, dissenting:

I respectfully disagree with the majority's view that juror Payton's failure to disclose his son's accident during voir dire prejudiced Greenwood's right of peremptory challenge under our Photostat Corp. v. Bill.

The record does not indicate that juror Payton, by his silence, improperly answered the court's voir dire query as to whether he or any member of his family had sustained any injuries resulting in any disability or prolonged pain or suffering. Payton simply did not consider his son's broken leg received as the result of an exploding tire, to be an injury resulting in disability or prolonged pain and suffering. He so stated during the post-trial telephone interview. That statement, in my view, does not imply that Payton believed that Billy's injuries did not give rise to a disability or prolonged pain and suffering.

Payton's expressed belief that his son's broken leg did not result in a disability or prolonged pain and suffering must be considered in the context of risks that a parent recognizes in the everyday life of growing children. It does not establish probable bias with consequential prejudice to the Greenwoods. This conclusion is justified, I believe, in light of the unanimous jury assessment of Billy's damages in amount of \$375,000.00.

If juror Payton had been prejudiced against Billy's injuries to the extent indicated, it is inconceivable that he would have joined in assessing Billy's damages at \$375,000.00. Thus, I would hold that there has been no showing of probable bias by juror Payton with consequent prejudice to Billy.

In lieu of complete reversal, I suggest that a partial remand to the trial court with instruction to conduct an evidentiary hearing into the issue of Payton's possible bias and prejudice is the proper course to be followed.

SEPTEMBER TERM - October 4, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr.,
Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable
William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan,
Honorable Stephanie K. Seymour, Circuit Judges, and Honorable
Clarence A. Brimmer, Jr., District Judge*

BILLY G. GREENWOOD, a minor child,)	
by his parents and natural guardians,)	
JOHN G. GREENWOOD and FREDA GREENWOOD;)	
JOHN G. GREENWOOD, individually; and)	
FREDA GREENWOOD, individually,)	
)	
Plaintiffs-Appellants,)	No. 80-1698
)	
v.)	
)	
MCDONOUGH POWER EQUIPMENT, INC.,)	
)	
Defendant-Appellee.)	


This matter comes on for consideration of appellee's
petition for rehearing and suggestion for rehearing en banc in the
captioned cause.

Upon consideration whereof, the petition for rehearing is
denied by the panel to whom the case was argued and submitted.
Judge Barrett voted to grant rehearing.

The petition for rehearing having been denied by the panel
to whom the case was argued and submitted, and no member of the panel
nor judge in regular active service on the Court having requested that
the Court be polled on rehearing en banc, Rule 35, Federal Rules of
Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By


Robert L. Hoecker
Chief Deputy Clerk

* Of the United States District Court for the District of Wyoming,
sitting by designation.

No. 82-958

Office-Supreme Court, U.S.
FILED

JUL 29 1983

ALEXANDER L. STEVENS, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1982

— o —
McDONOUGH POWER EQUIPMENT, INC.,
Petitioner,
vs.

BILLY G. GREENWOOD, a minor child, by his parents
and natural guardians, JOHN G. GREENWOOD and
FREDA GREENWOOD; JOHN G. GREENWOOD, in-
dividually; and FREDA GREENWOOD, individually,
Respondents.

— o —
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

— o —
JOINT APPENDIX
— o —

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RELEVANT DOCKET ENTRIES

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1. Clerk's minute sheet, page 1	4/09/80
2. Special Verdict	4/25/80
3. Plaintiff's Motion to Approach Jurors	4/30/80
4. Defendant's Response to Plaintiff's Motion to Approach Jurors	4/29/80
5. Memorandum and Order denying plaintiff's Motion to Approach Jurors	4/30/80
6. Plaintiff's Second Motion to Approach Jurors	5/01/80
7. Order granting plaintiff's Second Motion to Approach Jurors	5/05/80
8. Plaintiff's Motion for a New Trial	5/05/80
9. Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial	5/28/80
10. Order denying Plaintiff's Motion for New Trial	6/02/80

The opinion of the U. S. Court of Appeals is reproduced in the appendix to the Petition for Certiorari at A-1. The opinion is reported at 687 F. 2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix to the Petition for Certiorari at A-13.

No. 82-958

In The
Supreme Court of the United States
October Term, 1982

McDONOUGH POWER EQUIPMENT, INC.,
Petitioner,
vs.

BILLY G. GREENWOOD, a minor child, by his parents
and natural guardians, JOHN G. GREENWOOD and
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**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

JOINT APPENDIX

TRANSCRIPT OF VOIR DIRE EXAMINATION

Now with that general background of your duties let's
now Mr. Clerk, fill the jury box with 12 jurors and we will
start with the selection of the jury.

The Clerk: As I call your name please step to the
jury box.

Harvey Barnhill, Carolyn Engert, Patricia Murray,
Max Frauenfelder, Steve Hillard, Diane Duke, Marguerite
Finnigan, Ethelyn Roose, Donald Cook, Albert Elser—

Mr. Elser: Sir, you said I could be excused.

The Clerk: Mr. Elser, Your Honor, is going to school and he is also a teacher.

The Court: All right, we will excuse you. You may step aside.

The Clerk: David Kerns, Connie Gladhill, Ronald Payton.

The Court: Now ladies and gentlemen, we are going to ask you certain questions and please do not think that the attorneys or the Court—please do not think that we are trying to inquire too deeply into your personal lives, but we would like to know something about your background and history. And for that reason we will ask you certain questions. Eventually the attorneys will select the jurors that will actually try this case.

Now to the rest of you back there let me also ask all of you to listen to the questions that I ask and the statements that I make. And also listen to the questions that the attorneys ask, because it will save us considerable time if you are brought forward, which is quite possible.

Now let me first give you just a little background of the case. I said this was a civil case, and this is a personal injury case arising from the use of a lawn mower and it involves injury to the plaintiff, Billy G. Greenwood. This injury occurred on May 25, 1976, near Topeka. The injury occurred when Billy G. Greenwood came in contact with the blades of a Snapper riding lawn mower which was manufactured by the defendant in this case. Now the plaintiff claims that the lawn mower was defective and unreasonably dangerous, and for that reason the defend-

ant should be liable in damages to the plaintiff for the injuries suffered.

Now the defendant claims that the lawn mower was neither defective nor unreasonably dangerous and that there is no legal liability on the defendant's part arising out of the plaintiff's injuries.

Now this is just a brief summary of the claims of the parties, and the attorneys in their opening statements will tell you much more about the case than the Court has told you in this short time, but this will give you some background about the type of case that is going to be tried.

Let me also say to all of you that it is anticipated that this case will take approximately two weeks to try so that would help you fit this into your schedule. If you have any serious conflicts we will try to work around those conflicts.

I also need to say that we are going to try this case today, tomorrow, this is Tuesday, Wednesday and Thursday and then on Friday—this is Wednesday. All right, this is Wednesday. I've lost a day already. This is Wednesday. We will try this case Wednesday, and Thursday and then on Friday we are going to take the day off because the attorneys have certain conflicts in which they are scheduled to appear, at least one of the attorneys is scheduled to appear at a national conference and so for that reason we are going to have to take off. We will not try the case on Friday. Then the next week we would anticipate that we will try the case the full week and that should complete the case. We hope that we can work it in in that period of time. This is to give you an idea that we would try it Wednesday and Thursday of this week

and then the total of next week and we hope that we will be able to get all the evidence in to you at that time.

Now let me—in asking my questions I'm going to direct a few questions to you directly and then I will ask some general questions.

First Mr. Barnhill, let me talk to you. You are from Topeka, Kansas, and you are the Adjutant General of Kansas; is that correct?

Mr. Barnhill: I'm employed by the Kansas National Guard.

The Court: You are employed by the Kansas National Guard and you work for the Adjutant General of Kansas?

Mr. Barnhill: Yes.

The Court: And you are the personnel manager?

Mr. Barnhill: Personnel manager specialist.

The Court: And let me also find out how long have you been with the National Guard? Some period of time, or have you had any other past occupation that might be interesting to all of us?

Mr. Barnhill: Well, I have about 21 years with the National Guard.

The Court: All right. And in that particular work I assume you are responsible for personnel records, and responsible for hiring and certain things like that; is that correct?

Mr. Barnhill: That's correct.

The Court: And what is your wife's occupation.

Mr. Barnhill: She works for Northwestern National here in Topeka.

The Court: All right.

Mr. Barnhill: Insurance.

The Court: And that is an insurance company?

Mr. Barnhill: Yes.

The Court: What sort of insurance does Northwestern National sell? Is that life insurance or what? Tell me about that.

Mr. Barnhill: Well, they insure property.

The Court: All right.

Mr. Barnhill: She is an underwriter for that company.

The Court: All right.

Mrs. Engert, you are from Manhattan. Tell me what you do.

Mrs. Engert: I'm unemployed right now.

The Court: What did you do prior to being unemployed?

Mrs. Engert: A hysteroLOGY technician in a clinical laboratory.

The Court: All right. And are you married?

Mrs. Engert: No, I am not.

The Court: Now, as a lab technician what sort of education have you had there for that work?

Mrs. Engert: The training was all from the Peterson Lab. It was on-the-job training.

The Court: All right. Mrs. Murray, you are from Topeka and you work for SRS?

Mrs. Murray: Yes.

The Court: What do you do exactly?

Mrs. Murray: I work in the food stamp division where the food stamps are mailed out.

The Court: And you work for the—is it solely for the State of Kansas though?

Mrs. Murray: Yes.

The Court: Although you handle certain federal programs; is that correct?

Mrs. Murray: Yes.

The Court: What is your husband's occupation?

Mrs. Murray: He works for Dupont.

The Court: And what does he do exactly there?

Mrs. Murray: He works in the finishing department.

The Court: All right.

Mr. Frauenfelder, you are from Manhattan and you work for Star Incorporated?

Mr. Frauenfelder: Yes, sir.

The Court: Tell us what that is, please.

Mr. Frauenfelder: It's a farm organization. I'm a farm hand, work on a farm as a farm hand taking care of livestock.

The Court: And does this organization, do they have land around Manhattan; is that correct?

Mr. Frauenfelder: Yes, sir.

The Court: And I am not familiar—I came from Manhattan and I am not familiar with this. Is it Star Incorporated?

Mr. Frauenfelder: Yes.

The Court: Does any corporation own that?

Mr. Frauenfelder: There's Vanier's out of Salina own it.

The Court: I was going to suggest that probably that was Vanier's land.

Mr. Frauenfelder: Yes, and it's one of their organizations.

The Court: Where does your wife work?

Mr. Frauenfelder: She works for Stickles Cleaners in Aggieville.

The Court: All right. Mr. Hillard, you are from Alma and you work as a disability examiner for the State of Kansas?

Mr. Hillard: That's correct.

The Court: And are your offices here in Topeka?

Mr. Hillard: Yes, they are.

The Court: All right. And in your disability work tell us exactly what do you do there? Do you help in rehabilitation or—

Mr. Hillard: No, sir, I work—it's an SRS program. It's federally funded and I work for the State of Kansas adjudicating claims for Social Security on disability.

The Court: Are you married?

Mr. Hillard: Yes, I am.

The Court: What is your wife's occupation?

Mr. Hillard: She's a speech therapist.

The Court: At one of the schools?

Mr. Hillard: Yes, Wamego School District.

The Court: Miss Duke, you are from Topeka?

Miss Duke: Yes.

The Court: And you work for Frito-Lay?

Miss Duke: Right.

The Court: What do you do?

Miss Duke: I'm a data entry operator.

The Court: And are you married?

Miss Duke: No, I am not.

The Court: Mrs. Finnigan, you are from Frankfort,
Kansas?

Mrs. Finnigan: Yes.

The Court: And you are an LPN?

Mrs. Finnigan: Yes.

The Court: Do you work in a hospital?

Mrs. Finnigan: I'm not employed right now, but I
have—I have worked in all phases of nursing.

The Court: All right. And are you married?

Mrs. Finnigan: Yes.

The Court: What is your husband's occupation?

Mrs. Finnigan: My husband is retired. He worked in a feed mill.

The Court: All right. Mrs. Roose; is that right?

Mrs. Roose: Yes.

The Court: You are from Topeka and you work for J. M. McDonald Company?

Mrs. Roose: Yes.

The Court: And your husband works for Curtis-Knoll. Tell me what Curtis-Knoll is?

Mrs. Roose: They sell fasteners, and hardware for Curtis-Knoll.

The Court: Has he been in this line of work and have you been in this line of work for sometime?

Mrs. Roose: Yes.

The Court: All right.

Mr. Cook, you are from Emporia and you work for the City of Emporia?

Mr. Cook: Yes.

The Court: And what do you do there exactly, Mr. Cook?

Mr. Cook: I'm working foreman in the street department.

The Court: And your wife, where does she work?

Mr. Cook: Hopkins Manufacturing.

The Court: And have you worked for the City for sometime?

Mr. Cook: A little over 15 years.

The Court: All right.

Mr. Kerns, you are from Hiawatha and you do book-keeping and office work for Schuetz Tool and Die?

Mr. Kerns: Yes.

The Court: Tell me about that company? Perhaps it tells me there, but what do they do exactly?

Mr. Kerns: Well, it's a small manufacturing concern that makes die sets that are used on these large presses to make blowers or other kinds of parts for machinery.

The Court: What is your wife's occupation?

Mr. Kerns: She's a cook and dining room attendant at the nursing home.

The Court: All right. Mrs. Gladhill, you are from Abilene and you are a housewife?

Mrs. Gladhill: Yes.

The Court: And your husband is a minister?

Mrs. Gladhill: Yes.

The Court: All right. Have you had any other employment in the past years?

Mrs. Gladhill: I've worked in food service in the past several years in various ways. We were managers of a Christian Seminar Camp for the last 16 years.

The Court: All right.

Mr. Payton, you are from Hartford, Kansas?

Mr. Payton: Yes.

The Court: And you work for Iowa Beef Processing?

Mr. Payton: Yes.

The Court: How long have you been with them?

Mr. Payton: Ten years.

The Court: All right. And your wife is a housewife?

Mr. Payton: Yes, sir.

The Court: All right.

Now let me ask all of you generally, but let me first introduce to you, I believe you heard the names of the attorneys, but at the first table is Mr. Gene Schroer and with him is his partner. Let me find out from you, have any of you had any law business with Mr. Schroer or are you personally related to him or to Mr. Wulz? Any relationship there? He is a practicing attorney here in Topeka and I want to find out if any of you have had any law business with him?

(Reporter's Note: No audible response.)

The Court: Mr. Schroer, would you introduce the people with you, please.

Mr. Schroer: Yes; next to me is Freda Greenwood, the mother of Billy Greenwood, and her husband Mr. John Greenwood.

The Court: Let me ascertain are any of you acquainted with the Greenwoods; any of you related to them in any connection there at all? That might be important to the Court one way or another.

(Reporter's Note: No audible response.)

The Court: Over at the other table is Mr. Patterson and his partner. They practice also here in Topeka, Kansas. Let me find out have any of you had any law business with Mr. Patterson? Have you any relationship to Mr. Patterson or his partner?

(Reporter's Note: No audible response.)

The Court: Mr. Patterson, would you introduce the gentleman with you?

Mr. Patterson: Assisting me in trial is Mr. Fabert, and the next gentleman down is Clifford Boyleston. Mr. Boyleston is an engineer with McDonough and lives near McDonough, Georgia. McDonough is about 35 miles out of Atlanta. And to his left is Mr. John Ulmer, who is legal counsel for the McDonough office and part of the administrative staff of McDonough.

The Court: Now, I think it would be very remote, but now that I have learned how to pronounce the name of that company, the McDonough Company, it's a corporation. Let me find out have any of you had any relationship at all with this corporation for example, as a stockholder, an employee or any relationship at all with this corporation?

(Reporter's Note: No audible response.)

The Court: All right. Now, let me find out have any of you served as a juror in a criminal or a civil case or as a member of a Grand Jury, federal Grand Jury in a criminal case? Any of you had any experience serving as jurors? If so would you raise your hands.

(Reporter's Note: No response.)

The Court: Let me also ascertain have you heard anything at all about this case? Do you have any information about the facts of the case over and above what the Court has revealed to you at this time?

(Reporter's Note: No audible response.)

The Court: And from what you have heard, have any of you formed any opinion at all about the case?

(Reporter's Note: No audible response.)

The Court: Now, recognizing that we are looking for six jurors here who will decide the case based solely on the evidence as they hear it from the witness stand and the instructions on the law as given to you by the Court, do any of you at this time have any opinion about the case whatsoever?

(Reporter's Note: No audible response.)

The Court: Let me ask you this question: If you were Mr. Schroer presenting this case for the plaintiff would you be satisfied to present the case to a juror in your frame of mind right at this point?

(Reporter's Note: No audible response.)

The Court: On the other hand if you were Mr. Patterson who is going to be handling the defense of this case would you be satisfied to submit the case to a juror in your frame of mind at this time?

(Reporter's Note: No audible response.)

The Court: Now, let me also ascertain from you, I told you about the schedule and I hope that we would finish this case by next week, but any of you that would have a serious problem with the schedule such as I have

just outlined to you? If so, we—we don't want anyone that would be in a very bad position and feel like they needed to conclude this case rapidly. That is what I am trying to find out.

Mr. Frauenfelder: I'd like to be gone the 18th. I work for the farm with sheep and we have got that ram sale in Hutchinson the 18th.

The Court: Does that cause us any problem, gentlemen?

Mr. Schroer: That is Thursday I believe.

Mr. Patterson: That is a Friday. And it will be close.

The Court: Would you feel more comfortable if we allowed you to step down?

Mr. Frauenfelder: I sure would.

The Court: We might meet that deadline, but it might cause some problems. I believe Mr. Frauenfelder, I'll allow you to step down. We'll call another juror. You will eventually be called back, but this case might run us very close to your schedule there so you may step down.

Mr. Clerk, will you call another juror?

The Clerk: Joy Wendt.

The Court: Mrs. Wendt, you are from Topeka and you are an executive secretary for the First National Bank; is that correct?

Mrs. Wendt: That's correct.

The Court: And your husband works for Southwestern Bell?

Mrs. Wendt: That's correct.

The Court: All right. Now, I have just given the schedule to the other jurors here, but I haven't had a chance to—would you be able to meet this schedule if—it doesn't cause you any particular problem?

Mrs. Wendt: No:

The Court: All right, fine. Then in regard to the other questions that I have been asking here have you ever served as a juror?

Mrs. Wendt: No, I have not.

The Court: Do you know any of the parties or the attorneys, have any relationship with them at all?

Mrs. Wendt: No.

The Court: And I have asked other questions here which had to do with any relationship with this corporation at all. You have no problems there?

Mrs. Wendt: No.

The Court: I assume you are not a stockholder of this corporation or—

Mrs. Wendt: No, I am not.

The Court: —or have any relationship there at all? Let me ask you generally, do you know of any reason if you would be selected to serve as a juror you could not serve and be completely fair and impartial in this case? Any problem at all that you see?

Mrs. Wendt: No problems.

The Court: All right.

I believe I am now ready to ask the attorneys to inquire.

Mr. Schroer, would you like to inquire first?

If you wish to move the lectern around there do that, if you are strong enough.

Mr. Schroer: May it please the Court.

The Court: Mr. Schroer.

Mr. Schroer: Counsel, ladies and gentlemen, I will try to ask most of the questions to you all generally so that we can save time and not have to run down a long list. I don't want to repeat any of the questions in areas that the judge covered, but I think there are a few things that because of the importance of this case that I would like to get into.

Let me first state that practicing law with me are some other individuals, Frank Rice, John Bryan, Dan Lykins, Danton Hejtmanek, Joe Patton.

Now the Judge asked you if you had any business with our firm. I'd like to expand on that and ask if any of you have either done business with any members of our firm or know any of us personally that it might affect your ability to be comfortable in deciding this case?

(Reporter's Note: No audible response.)

Mr. Schroer: If any of you feel that it is a question in your mind would you please raise your hand; otherwise I'll assume not.

(Reporter's Note: No response.)

Mr. Schroer: I next would like to ask Mr. Patterson to mention the various members of his firm so that I might ask one of you a question.

Mr. Patterson: You want me to go down the list?

Mr. Schroer: Yes.

Mr. Patterson: David Fisher, myself, Keith Sayler, Dudley Smith, Larry Pepperdine, Jim Nordstrom, J. B. King, Steve Pigg and Steve Fabert who is with me.

Mr. Schroer: Now, do any of you know any of those gentlemen personally or have done any business with any members of that firm at any time?

(Reporter's Note: No response.)

Mr. Schroer: Again if so, please raise your hand.

(Reporter's Note: No audible response.)

Mr. Schroer: I see no hands raised so I assume that I have—you have no knowledge or acquaintance with any of those attorneys.

Now, the Judge asked you about facts of the accident. There were several newspaper articles about four years ago. This accident occurred at Cullen Village out just south of town and involved loss of both feet to young Mr. Billy Greenwood. Do any of you remember anything about a lawn mower accident and anything in the papers about the facts of that accident occurring about four years ago? That is the Topeka Daily Capital I am speaking of.

(Reporter's Note: No response.)

Mr. Schroer: If so, would you please raise your hand.

Mrs. Wendt: I remember only the facts that you stated, but I do remember reading about it.

Mr. Schroer: Mrs. Wendt, you do remember then that the event occurred?

Mrs. Wendt: Yes, I do.

Mr. Schroer: Do you remember any other facts other than what I have stated?

Mrs. Wendt: No, I remember a child being hurt in a lawn mower accident. And when you said "Cullen Village" I remember that that brought that to mind.

Mr. Schroer: I assume you have no impressions from that newspaper article other than just the facts that we have talked about?

Mrs. Wendt: That is exactly right.

Mr. Schroer: Thank you.

Now, I'd like to ask you whether or not any of you have had court litigation yourselves or any members of your immediate family have been involved either as a plaintiff or a defendant or in some way been inside a courtroom for business purposes? If it was a member of the family I am only interested in whether or not it might have given you some impressions or some feelings or attitude about the system. Therefore, how many of you have either been to a lawyer over a legal matter or either been sued or sued someone else or been to Court at anytime?

Would you raise your hands.

(Reporter's Note: Response.)

Mr. Schroer: Let me just ask the back row first. Would you raise your hands?

(Reporter's Note: Response.)

Mr. Schroer: Five in the back row. Thank you.

And the front row?

(Reporter's Note: Response.)

Mr. Schroer: Three in the front row. Thank you.

Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

I'll ask you to raise your hands? Back row first.

(Reporter's Note: No response.)

Mr. Schroer: I see no hands raised in the back row.

Front row?

Mr. Cook: "Response."

Mr. Schroer: One in the front row.

My next question I would like to ask you all generally deals with your attitude toward the system that we have in this country, in this state, the Court touched upon it, and that is the rights of the parties to come to Court to have their differences settled, to have their cases heard, to bring the case and to defend the case, the system that has a judge to instruct on the law and the system that allows jurors to decide the facts. Are there any of you that have any philosophies, political, or ideological, or psychological who in any way doesn't believe that this is

a good system or doesn't believe we should have this system of justice or doesn't believe that this is the way disputes should be settled or doesn't like the idea of Court cases and juries deciding differences between people?

(Reporter's Note: No response.)

Mr. Schroer: Are there any of you that do not believe in the jury system, and do not believe in the system of justice that we have in this great country or have any reservations about it in the sense that people shouldn't seek money damages for injuries caused by other people?

(Reporter's Note: No response.)

Mr. Schroer: Are there any of you that have any questions, or doubts or philosophies that would keep you from being a—the kind of juror and impartial juror that both sides want? If so, would you please raise your hand.

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

I thank you.

Now, I touched upon damages in my last question, but in wanting fair and impartial jurors in the case, the case here involves severe damages and a claim of award which will involve a great deal of money. Billy Greenwood is seeking a large amount of damages for the injuries that he believes were caused by the defendant. No one in the courtroom wants a juror at this time who has made up their mind with regard to anybody is not entitled to recover or recover anything, but just because a large amount of money is being sought for the injuries of this boy are there any of you that have any philosophy again that says,

"Even if proven I wouldn't award damages in a large amount. Even if they are proven to me I still couldn't give or award or compensate the injured person in terms of hundreds of thousands of dollars if it was proven to me." Are there any of you that believe that no damages or only a small amount of damages should be awarded to people who are injured?

(Reporter's Note: No response.)

Mr. Schroer: That is kind of a long question. I hope it is clear. Are there any of you that have that kind of attitude now before the case even starts that only a small amount of damages or no damages should be awarded if proven, even if they are proven? Are there any of you that have that attitude? Would you please raise your hand?

(Reporter's Note: No response.)

Mr. Schroer: Thank you.

Mr. Barnhill, do you have any particular attitude about claims, and accidents and injuries that are in any way the result of your wife's work, or occupation or profession?

Mr. Barnhill: No.

The Court: I assume that some of her profession deals with cases, or claims or injuries of some kind?

Mr. Barnhill: That is correct.

Mr. Schroer: Do you think you could be, despite that, just as good a juror for the plaintiff or just as fair-minded for the plaintiff's claim as though your wife was in some other field or endeavor?

Mr. Barnhill: I do.

Mr. Schroer: You understand the nature of my question and my concern about it?

Mr. Barnhill: That's correct.

Mr. Schroer: You understand there are some people that might not be naturally objective about lawsuits based on their employment, but you think you could be?

Mr. Barnhill: Yes.

Mr. Schroer: And you know of no reason why you couldn't award full compensation to Billy Greenwood if you found he is entitled to it?

Mr. Barnhill: That is correct.

Mr. Schroer: You believe that you could?

Mr. Barnhill: Yes.

Mr. Schroer: Do you have any questions in your mind at all about that?

Mr. Barnhill: No.

Mr. Schroer: Or any of the other question I asked?

Mr. Barnhill: No.

Mr. Schroer: Let me ask all of you, are any of you hard of hearing that would have any difficulty hearing the evidence?

Mr. Cook: A certain amount.

Mr. Schroer: Mr. Cook, you are hard of hearing?

Mr. Cook: A certain per cent on certain levels.

Mr. Schroer: Let me ask you if you are allowed to sit in this case do you think you could hear better if you were allowed to sit in a position closest to the witness box?

Mr. Cook: It is just some sounds I can't hear. It's from being around heavy equipment.

The Court: Can you hear the questions Mr. Schroer is asking you?

Mr. Cook: Yes.

Mr. Schroer: Can you hear me all right?

Mr. Cook: Yes.

Mr. Schroer: Can you hear me now?

Mr. Cook: Yes.

Mr. Schroer: Is it certain tones or certain words?

Mr. Cook: Yes: certain tones.

Mr. Schroer: Do you think it would affect your ability to hear all the evidence or would it be a word now and then or what that would bother—

Mr. Cook: No, I wouldn't.

Mr. Schroer: You think you could still hear well enough to be a juror?

Mr. Cook: Yes, sir.

The Court: Let me just say to the jurors, anytime you cannot hear put up your hand, and let me know, and I'll make them speak up and I'll be after them all the time anyway, but if anytime you cannot hear please put up your hand.

Mr. Schroer: Thank you, Your Honor.

Mr. Barnhill, have any of your children ever been injured while growing up in any serious way?

Mr. Barnhill: No.

Mr. Schroer: Did you live in the city all the time they were growing up?

Mr. Barnhill: Yes.

Mr. Schroer: You operate a lawn mower either walk behind or riding lawn mower?

Mr. Barnhill.: Riding.

Mr. Schroeder: You have a riding lawn mower?

Mr. Barnhill: Yes.

Mr. Schroer: Let me ask all of you, do any of you own a McDonough Snapper riding lawn mower?

(Reporter's Note: No response.)

Mr. Schroer: Or a McDonough walk behind lawn mower?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

Do you operate the mower yourself?

Mr. Barnhill: Yes.

Mr. Schroer: Any of your children operate the mower?

Mr. Barnhill: Well, I've got a riding mower and then I've got a push mower and they use the push mower.

Mr. Schroer: You cut the grass yourself?

Mr. Barnhill: Yes, most of the time.

Mr. Schroer: How old are your children?

Mr. Barnhill: My oldest is 21, and I've got one 20, and one 18 and one will be, I believe, 12.

Mr. Schroer: Have any of your children driven the riding lawn mower, cut the grass with the riding lawn mower?

Mr. Barnhill: Yes.

Mr. Schroer: Do you have a fence in your yard or an open yard?

Mr. Barnhill: Open.

Mr. Schroer: Thank you, sir.

Carolyn Engert; is it?

Mrs. Engert: That's right.

Mr. Schroer: Have you done any other kind of work other than been a lab technician?

Mrs. Engert: I was receptionist insurance clerk at the medical laboratory.

Mr. Schroer: Are your children with you?

Mrs. Engert: One is.

Mr. Schroer: What age?

Mrs. Engert: She's 15.

Mr. Schroer: And your other children? Older or younger?

Mrs. Engert: Older.

Mr. Schroer: Have you ever been around a riding lawn mower?

Mrs. Engert: Yes, I have.

Mr. Schroer: Operated it yourself?

Mrs. Engert: Yes.

Mr. Schroer: How? At what age? After marriage?

Mrs. Engert: Yes.

Mr. Schroer: Or while you were a lounging lady?

Mrs. Engert: While I was married.

Mr. Schroer: Your husband or children operate the mower too?

Mrs. Engert: My husband occasionally. I used it most of the time.

Mr. Schroer: You did most of the time?

Mrs. Engert: That's right.

Mr. Schroer: And the children ever operate the mower?

Mrs. Engert: No.

Mr. Schroer: What ages were they when you were with him and had the mower?

Mrs. Engert: Oh, starting out probably 5 through 15—make that 5 through 18.

Mr. Schroer: You are saying even at the age of 17, 18, 15—I don't know whether they are boys or girls.

Mrs. Engert: All girls.

Mr. Schroer: Did you not have them operate the mower because it wasn't convenient or did you have any hesitancy about it?

Mrs. Engert: I was hesitant about it. We had a very sloping yard and I was hesitant about it.

Mr. Schroer: The fact they were girls had something to do with it too?

Mrs. Engert: No.

Mr. Schroer: Mrs. Murray, have you operated a riding lawn mower yourself?

Mrs. Murray: No, I haven't. I've been around them, but I haven't ever operated one.

Mr. Schroer: Do you have one at the present?

Mrs. Murray: Well, we have a push mower and I have mowed the yard with it.

Mr. Schroer: You know the difference between a riding and a push mower?

Mrs. Murray: Yes.

Mr. Schroer: Have you had any riding mower?

Mrs. Murray: No, my brother-in-law has one.

Mr. Schroer: So you have never operated a riding mower yourself?

Mrs. Murray: No.

Mr. Schroer: Have you operated the walk behind?

Mrs. Murray: Yes.

Mr. Schroer: And your children are obviously at various ages?

Mrs. Murray: I have a 14-year old son, and a 13-year old daughter, and an 8-year old daughter and a 6-year old boy.

Mr. Schroer: Thank you.

Mrs. Wendt, are you in a certain department at the bank?

Mrs. Wendt: Yes.

Mr. Schroer: What department is that?

Mrs. Wendt: I work for Tom Clevenger.

Mr. Schroer: President of the bank?

Mrs. Wendt: Yes.

Mr. Schroer: Are you his executive secretary?

Mrs. Wendt: That's right.

Mr. Schroer: Or personal secretary or what? What type of work does your husband do at Southwestern Bell?

Mrs. Wendt: He's in the engineering department.

Mr. Schroer: Is he a licensed or graduate engineer?

Mrs. Wendt: No, he is not.

Mr. Schroer: What is he, more in the drafting, planning or drawing?

Mrs. Wendt: His schooling was on-the-job training, but he's in switch engineering.

Mr. Schroer: Switch engineering?

Mrs. Wendt: Yes.

Mr. Schroer: I won't ask what that is.

Mrs. Wendt: Please don't.

Mr. Schroer: Has he been with them a long time?

Mrs. Wendt: Almost 25 years.

Mr. Schroer: Do you and your husband have a riding lawn mower?

Mrs. Wendt: No, we don't.

Mr. Schroer: Have you ever been around them?

Mrs. Wendt: No, I haven't.

Mr. Schroer: Ever operated them?

Mrs. Wendt: No, I haven't.

Mr. Schroer: Thank you.

Mr. Hillard?

Mr. Hillard: That's correct.

Mr. Schroer: Let me ask you about your experience with riding mowers. Have you had any?

Mr. Hillard: I have ridden on one one time.

Mr. Schroer: Do you have a walk behind?

Mr. Hillard: No, we don't.

Mr. Schroer: Do you live in an apartment?

Mr. Hillard: We just moved in a new house in December and our yard isn't planted yet.

Mr. Schroer: How about in previous years, have you cut your own yard?

Mr. Hillard: Yes.

Mr. Schroer: What with?

Mr. Hillard: A push mower.

Mr. Schroer: Never operated a riding mower?

Mr. Hillard: One time.

Mr. Schroer: Well, I meant except for that one time?

Mr. Hillard: No.

Mr. Schroer: Thank you, sir.

Miss Duke, what has been your experience with riding lawn mowers?

Miss Duke: Never operated one.

Mr. Schroer: Have you been around any of them?

Miss Duke: No.

Mr. Schroer: Have you ever operated the walk behind?

Miss Duke: Yes, I have.

Mr. Schroer: Did you cut the grass quite a bit or a little bit?

Miss Duke: I helped my father when I was younger.

Mr. Schroer: Regularly or occasionally?

Miss Duke: Occasionally.

Mr. Schroer: Did you then live with your parents you mean, when this happened?

Miss Duke: Yes.

Mr. Schroer: Did you have a big yard or little yard?

Miss Duke: Yes, big yard.

Mr. Schroer: Your father is a circuit designer of some kind?

Miss Duke: Right.

Mr. Schroer: What is that?

Miss Duke: Santa Fe.

Mr. Schroer: What is that?

Miss Duke: The signals on train relays, he helps design them.

Mr. Schroer: Do you have any younger brothers and sisters?

Miss Duke: Yes, I do.

Mr. Schroer: What age range?

Miss Duke: I have a sister 20 and a sister 16.

Mr. Schroer: You have heard all these questions I have asked everyone else? Is there any question in your mind about your ability to be a fair and impartial juror?

Miss Duke: No, sir.

Mr. Schroer: Do you feel good about the possibility of sitting on a jury or do you sort of dread it a little bit?

Miss Duke: I feel fine.

Mr. Schroer: Are you looking forward to it or—if you are chosen or are you hoping you won't be?

Miss Duke: I feel fine about it.

Mr. Schroer: Thank you. Have you held various kinds of jobs or employment while growing up?

Miss Duke: I've held three jobs.

Mr. Schroer: What kind?

Miss Duke: I was a manager of a Kwik-Shop for three years. Then I worked for the federal government for a year and a half and then I worked for Frito-Lay.

Mr. Schroer: What kind of work do you do for Frito-Lay?

Miss Duke: I'm a data entry operator.

Mr. Schroer: Data—

Miss Duke: Data entry operator.

Mr. Schroer: Machines then?

Miss Duke: Yes.

Mr. Schroer: And for the federal government what did you do?

Miss Duke: I was a secretary.

Mr. Schoer: Thank you. You replied and raised your hand with regard to being involved or having someone in your immediate family involved in some claim or—

Miss Duke: Myself.

Mr. Schroer: What kind was that?

Miss Duke: It was a landlord.

Mr. Schroer: Did you go to court?

Miss Duke: Yes.

Mr. Schroer: Did he take it to court or did you?

Miss Duke: He did.

Mr. Schroer: Did you actually have a trial?

Miss Duke: No.

Mr. Schroer: Was it settled?

Miss Duke: Yes.

Mr. Schroer: In some way?

Miss Duke: Yes.

Mr. Schroer: Did that experience cause you any good or bad feelings about the system of courts and justice?

Miss Duke: No.

Mr. Schroer: You feel reasonably good about the system then as it is?

Miss Duke: Yes.

Mr. Schroer: I believe I neglected to ask you Mrs. Wendt, did you also raise your hand on that question?

Mrs. Wendt: That I had been to court?

Mr. Schroer: Yes.

Mrs. Wendt: Yes, I was a witness in a divorce trial.

Mr. Schroer: Is that the only occasion?

Mrs. Wendt: That is the only occasion.

Mr. Schroer: Several years ago?

Mrs. Wendt: Yes, it has been.

Mr. Schroer: Did that divorce involve someone who was very close?

Mrs. Wendt: Yes, it was my sister.

Mr. Schroer: Did that court decision—however I won't ask you about that—did that cause you to feel any bitterness or dislike for the way the courts are run or how the case was decided?

Mrs. Wendt: No, it did not.

Mr. Schroer: So it therefore wouldn't affect your attitude toward the courts at this time?

Mrs. Wendt: No, it would not.

Mr. Schroer: Mrs. Murray, I believe I forgot to ask you the same question. What was your experience?

Mrs. Murray: Well, I just have filed charges against a former company I worked for for wages that I didn't receive.

Mr. Schroer: It is nothing has happened yet?

Mrs. Murray: No.

Mr. Schroer: So then would that affect you one way or another so far as your attitude towards the courts?

Mrs. Murray: No.

Mr. Schroer: Are you represented by an attorney in that?

Mrs. Murray: Yes.

Mr. Schroer: But it is none of the attorneys named in the earlier discussion?

Mrs. Murray: No.

Mr. Schroer: Thank you.

And Mrs. Engert, what was your reason for raising your hand on that question?

Mrs. Engert: It was my divorce. And then a very long time ago I was involved in an automobile accident and someone was fatally injured. I was not driving, I was a passenger in the car. And charges were brought against the driver.

Mr. Schroer: Did you go to court in that experience?

Mrs. Engert: It was done in a preliminary hearing to determine whether or not a fair trial in the City of Manhattan—

Mr. Schroer: Did that cause you to get any permanent attitude towards the system of justice?

Mrs. Engert: No.

Mr. Schroer: Either one way or another?

Mrs. Engert: No.

Mr. Schroer: That is the only occasion?

Mrs. Engert: Yes.

Mr. Schroer: Mr. Barnhill, what was yours?

Mr. Barnhill: A divorce.

Mr. Schroer: Anything else?

Mr. Barnhill: No.

Mr. Schroer: Thank you.

Mrs. Finnigan, are you around a great deal of pain and suffering in your work?

Mrs. Finnigan: I have been, yes.

Mr. Schroer: Does that get to you in any way personally when you see a lot of it?

Mrs. Finnigan: No, well, there is a certain amount that gets to anybody, but you have to learn that people go through this pain and you just help them as best you can. You can't take it home with you.

Mr. Schroer: In this case the jury will be asked to assess damages for the amount of pain and suffering to Billy Greenwood. Do you suppose being around so much pain you might be immune and less sensitive to judging that pain than someone who hadn't been around so many people who were sick or injured?

Mrs. Finnigan: No, I don't think so.

Mr. Schroer: Do you think you still could and would you try to objectively judge the amount of his pain and suffering?

Mrs. Finnigan: Yes.

Mr. Schroer: If the Judge asked you to in the instructions?

Mrs. Finnigan: Yes.

Mr. Schroer: And you would try to do that; would you?

Mrs. Finnigan: Definitely. People have always said that I've always been very objective about things, give an honest opinion.

Mr. Schroer: That is what we want is an objective juror. Have you had children of your own?

Mrs. Finnigan: Yes, I have two.

Mr. Schroer: Grown?

Mrs. Finnigan: Grown daughters.

Mr. Schroer: Have you ever been around riding lawn mowers?

Mrs. Finnigan: My husband has one. We call it his "toy."

Mr. Schroer: You don't operate it?

Mrs. Finnigan: No.

Mr. Schroer: You have heard all these questions that we have been asking. Do you understand that myself, and the Judge and other counsel are trying to select the six most impartial persons to try this case?

Mrs. Finnigan: Yes.

Mr. Schroer: Do you feel you could be one of those?

Mrs. Finnigan: Yes, I do.

Mr. Schroer: Would you drive back and forth to—what is it, Frankfort?

Mrs. Finnigan: I think I'd stay with my daughter in Eudora.

Mr. Schroer: And not make a trip every day?

Mrs. Finnigan: No.

Mr. Schroer: Thank you.

Mrs. Roose, what do you do in your work?

Mrs. Roose: I'm an area supervisor, supervise other sales people.

Mr. Schroer: I'm sorry. Maybe I'm hard of hearing.

Mrs. Roose: I supervise the other sales people in an area in the store, department store.

Mr. Schroer: Do you and your husband have a riding lawn mower?

Mrs. Roose: No, we don't.

Mr. Schroer: Have you ever operated one?

Mrs. Roose: No, I haven't.

Mr. Schroer: Do you have a walk behind lawn mower?

Mrs. Roose: Yes.

Mr. Schroer: Who cuts the grass?

Mrs. Roose: About half and half.

Mr. Schroer: How old are your children?

Mrs. Roose: 20 and 23.

The Court: Did they cut the yard when they were growing up as teenagers?

Mrs. Roose: Yes.

Mr. Schroer: What ages?

Mrs. Roose: I suppose 10 or 12 on up.

Mr. Schroer: You said that you had some matter involved in court or lawyers.

Mrs. Roose: It was a divorce.

Mr. Schroer: Anything other than that?

Mrs. Roose: No.

Mr. Schroer: Mr. Cook, you indicated also that you had been involved or someone of your family in some claim or case.

Mr. Cook: Well, I've been a witness in a divorce court.

Mr. Schroer: I should have said other than divorce.

Mr. Cook: And my wife has got a pending deal right now. It isn't in court or anything.

Mr. Schroer: What kind of a deal?

Mr. Cook: She got tendonitis in her hand.

Mr. Schroer: Is it a Workmens' Compensation claim or something like that? It was at work?

Mr. Cook: Yes.

Mr. Schroer: Is it a Workmens' Compensation claim?

Mr. Cook: Yes. She is working now. She has been at it for a year and she is still under a doctor's care.

Mr. Schroer: It is a permanent injury to the hand?

Mr. Cook: A certain amount, yes.

Mr. Schroer: Even though she is back at work?

Mr. Cook: Yes.

Mr. Schroer: Is she being represented by an attorney in that?

Mr. Cook: No.

Mr. Schroer: She is just trying to handle it herself?

Mr. Cook: Well, the doctor hasn't ever released her or anything.

Mr. Schroer: That you understand is totally different than this case?

Mr. Cook: Yes.

Mr. Schroer: It doesn't have anything to do with it?

Mr. Cook: Yes.

Mr. Schroer: And I assume it doesn't in your mind as far as being a fair juror?

Mr. Cook: Yes.

Mr. Schroer: Did you also raise your hand with regard to injury? Would that have been the same thing or was that different?

Mr. Cook: She got hurt out at Iowa Beef several years ago.

Mr. Schroer: Was that a claim for Workmens' Compensation matter there?

Mr. Cook: Workmens' Comp.

Mr. Schroer: Is that anything that would bother you in hearing of this case?

Mr. Cook: No.

Mr. Schroer: You have never been injured on the job?

Mr. Cook: Yes, I have.

Mr. Schroer: What kind of injuries did you have?

Mr. Cook: I got hit in the forehead about three years ago.

Mr. Schroer: Are you okay? Did it cause you any permanent disability of any kind?

Mr. Cook: No, I was just off a day with it.

Mr. Schroer: You heard the kind of questions I asked the other people about the belief in the system of justice we have?

Mr. Cook: Yes.

Mr. Schroer: Are you one of those people that believe in it, that it is the best in the world?

Mr. Cook: Yes.

Mr. Schroer: It may not be perfect, but it is the best in the world; is that right?

Mr. Cook: Yes.

Mr. Schroer: All right. Thank you. Do you think that if you sat close to the witness box it would enable you to hear better?

Mr. Cook: I can hear most things okay.

Mr. Schroer: And you will raise your hand if you don't hear something?

Mr. Cook: Yes.

Mr. Schroer: Mr. Kerns, you work for a company that makes tool and die sets?

Mr. Kerns: Yes.

Mr. Schroer: A manufacturing concern?

Mr. Kerns: Yes.

Mr. Schroer: Since this is a lawsuit involving a case against a manufacturing concern, do you think you have any natural sympathy for the manufacturer in a case like this?

Mr. Kerns: No.

Mr. Schroer: Do you understand this is the kind of case that sometimes is called a "products liability case?"

Mr. Kerns: Right.

Mr. Schroer: Do you believe that manufacturers should be responsible for making safe products?

Mr. Kerns: Yes, within reason.

Mr. Schroer: Within reason? Okay. That is fine. Do you feel that because you are in that business you might be a little more—you might lean a little bit toward a manufacturer since you are engaged in the manufacturing business than you would a young boy who claims to have been injured because of the defective product?

Mr. Kerns: No, I really don't think that would have anything to do with it.

Mr. Schroer: I mean sometimes it is hard for us to really know all the internal workings of our mind and our philosophy, but I know you read about products liability cases.

Mr. Kerns: I use products myself too, you know.

Mr. Schroer: You believe that the manufacturer has a duty to make the product as safe as possible?

Mr. Kerns: Within reasonable—reasonably so, yes.

Mr. Schroer: You don't feel that if you were selected as a juror that you would be automatically kind of in favor of the defendant because they are a manufacturer of a product?

Mr. Kerns: No.

Mr. Schroer: You consider yourself a consumer as well as a manufacturer?

Mr. Kerns: That's right.

Mr. Schroer: There have been a different kind of—a bunch of lawsuits involving the kind of heavy equip-

ment you make your stuff for I believe. Are you familiar with some of the areas of those lawsuits?

Mr. Kerns: Not really. I just know there have been some.

Mr. Schroer: Regarding double switching and distance of operators away from large presses and stuff like that?

Mr. Kerns: (Nods head)

Mr. Schroer: Were you aware of that generally?

Mr. Kerns: Yes.

Mr. Schroer: Although not specifically?

Mr. Kerns: Yes.

Mr. Schroer: Have you had any experience with a riding mower?

Mr. Kerns: I have used my father-in-law's and the neighbor's like when they are on trips to mow their yard or something like that. Otherwise mine is the kind you walk behind because I need the exercise.

Mr. Schroer: You don't own one?

Mr. Kerns: No.

Mr. Schroer: You have mentioned something about a claim, or a case or court appearance of some kind. Was that other than divorce?

Mr. Kerns: Yes; I worked as a loan officer in a bank for a number of years and there was a couple of instances we had to take somebody to court to collect a bad loan. Other than that, that is it.

Mr. Schroer: That is the only time?

Mr. Kerns: Yes.

Mr. Schroer: Thank you, sir.

Mrs. Gladhill, I was kind of asking the question about your attitude toward law courts and money damages generally, but I want to ask you about it personally. You are a minister's wife. What kind of church is your husband a minister in?

Mrs. Gladhill: The Latter Church of Christ.

Mr. Schroer: There are some particular moral attitudes that are inconsistent in some denominations that I am aware of, inconsistent with such things as money damages for injuries. Do you have any kind of moral attitude that would keep you from awarding a large amount of damages if the evidence proved it? Now you understand I don't want you to promise you will do it without the evidence, but if the evidence proved it, do you have any kind of philosophy or moral attitude in your church that you had personally that would keep you from awarding large damages to Billy if we prove he is entitled to them?

Mrs. Gladhill: No, sir.

Mr. Schroer: What kind of experience have you had with lawn mowers, riding or walk behind?

Mrs. Gladhill: My husband and I were managers of a summer camp for six years just prior to September of this last year and we mowed much of that with a riding mower.

Mr. Schroer: Used it there?

Mrs. Gladhill: Yes.

Mr. Schroer: Have you used it yourself?

Mrs. Gladhill: Yes.

Mr. Schroer: What age kids were in the summer camp?

Mrs. Gladhill: From fourth grade through high school.

Mr. Schroer: Some of the kids used the riding mower in camp, the bigger ones?

Mrs. Gladhill: No.

Mr. Schroer: You didn't let any of them?

Mrs. Gladhill: No.

Mr. Schroer: Have you lived in other cities other than Abilene?

Mrs. Gladhill: We don't live in town. We live in the country. We have lived in the country before we moved there.

Mr. Schroer: Have you lived in the country in other places then or in other cities?

Mrs. Gladhill: The last city we lived in was Manhattan when I was going to K-State about five years—five or six years ago.

Mr. Schroer: Have you ever worked outside the home?

Mrs. Gladhill: Yes; I worked on the food service at Marymount College.

Mr. Schroer: And did you finish college or almost complete college or—

Mrs. Gladhill: Graduated from K-State.

Mr. Schroer: From K-State? When?

Mrs. Gladhill: In 1975.

Mr. Schroer: What did you major in?

Mrs. Gladhill: Family and child development.

Mr. Schroer: What ages are your children?

Mrs. Gladhill: I have a boy is 2½ and a daughter 9 months.

Mr. Schroer: Thank you.

Mr. Payton, I didn't get clear in my mind—well, I shouldn't say that. Your wife is listed as a "housewife." Has she worked outside the home?

Mr. Payton: Not since the first kid.

Mr. Schroer: And how many children do you have?

Mr. Payton: Six.

Mr. Schroer: What is their range? I don't need—

Mr. Payton: Six to seventeen.

Mr. Schroer: Have you a power mower?

Mr. Payton: Yes; walk one.

Mr. Schroer: Have you ever had a riding mower?

Mr. Payton: No.

Mr. Schroer: Ever operate one?

Mr. Payton: No.

Mr. Patterson: I'm sorry, but I couldn't hear.

The Court: He said, "No" to both those questions.

Mr. Patterson: Thank you.

Mr. Schroer: Have you been a butcher for a number of years?

Mr. Payton: Ever since I got out of high school.

Mr. Schroer: And that is—can you tell me approximately how many years that is?

Mr. Payton: About 20.

Mr. Schroer: Did you ever work in a grocery store or always just for a packer?

Mr. Payton: Grocery store; packer.

Mr. Schroer: Both?

Mr. Payton: Yes.

Mr. Schroer: Now, I haven't—thank you, sir.

I haven't asked all of you the same questions. Let me ask you now, was there a question I asked somebody else that I didn't ask you that would have caused you to respond had the question been asked to you in some way that relates to information that we should know before Mr. Patterson and I with the help of the Court select the six to sit in the case? Was there any question I asked somebody else that raised the thought in your mind about your objectivity or that ought to be stated so that we'd know it as it affected some experience you had that might apply in this case? Any of you?

(Reporter's Note: No response.)

Mr. Schroer: Now, the Court will give you instructions and the facts will be presented from the witness stand and by evidence. Are there any of you that if you had some attitude on the law that is different from the judge's that can't put aside your own attitude on what the law is or ought to be and follow the judge's instructions even if they are different from what you thought they ought to be? Are there any of you that can't put aside your own ideas and follow the judge's instructions? If so, would you please raise your hand?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

Saying that in another way, you are responsible to decide the facts and the judge is—and you've got to follow the law given you by the judge. Are there any of you that don't think you would be able to just decide the facts in this case from the witness stand and be objective and fair in deciding those facts? Please raise your hand.

(Reporter's Note: No response.)

Mr. Schroer: When I say "fair" I mean at this point being open-minded and not having anything influence you one way or another in favor of the plaintiff or against the plaintiff or in favor of the defendant or against the defendant before you have heard the evidence?

(Reporter's Note: No response.)

Mr. Schroer: Again I see no hands raised.

I pass the jury for cause, Your Honor.

The Court: Mr. Patterson?

Mr. Patterson: May it please the Court.

Ladies and gentlemen of the panel, I have a few questions that I would like to ask some of you as individuals and then I am going to ask all the questions collectively. In some cases I will ask for individual answers, so if you will bear with me I will proceed in that manner and hopefully we won't take too long.

Mrs. Wendt, maybe I missed it, but do you have any children?

Mrs. Wendt: Yes, we have two; a son, 21 and a daughter, 20.

Mr. Patterson: Did you use any kind of power mower while your children—do your children still live with you?

Mrs. Wendt: Yes. We have a mower that you push, and our son used it the majority of the time probably from age 10 until now.

Mr. Patterson: All right.

Mr. Hillard, I didn't get whether or not you had any children, sir.

Mr. Hillard: I have a daughter.

Mr. Schroer: And what is the daughter's age?

Mr. Hillard: She's 4.

Mr. Patterson: I don't suppose she uses a power mower?

Mr. Hillard: No, she hasn't.

Mr. Patterson: All right, sir.

Now Mrs. Finnigan.

Mrs. Finnigan: Yes.

Mr. Patterson: I heard your remark, and I don't want to misquote you, and I'm afraid I might, that somehow either your husband or your husband's friend in a kidding manner referred to the riding mower as a "toy."

Mrs. Finnigan: Our family.

Mr. Patterson: Is that—do you really regard it as a toy or is that kind of a jest?

Mrs. Finnigan: No. No, he wouldn't let the children out in the yard when he is using it, but he enjoys using his mower. We have a very nice looking yard.

Mr. Patterson: I take it then, and I want you to correct me if I'm wrong, but it might be referred to as a "toy" as far as your husband is concerned, but in jest?

Mrs. Finnigan: In jest, yes, sir.

Mr. Patterson: As kind of a joke?

Mrs. Finnigan: Yes.

Mr. Patterson: Now, some of these questions may have been asked in a little bit different manner, but I really want to come right to the point. Are there any among you who have ever yourselves, or your immediate family, or a neighbor, those three categories of persons, yourselves, anyone in your immediate family or a neighbor ever been injured by any kind of power mower?

(Reporter's Note: Response.) 7

Mr. Schroer: Mrs. Finnigan?

Mrs. Finnigan: My husband had a rock thrown out from under the mower and cut his foot.

Mr. Patterson: How long ago did that happen?

Mrs. Finnigan: About 20 years ago.

Mr. Patterson: Okay. Now, you understand, of course, that this is a suit brought by a small child against the manufacturer of a power mower. Is there anything about your husband's experience, the injury that he received from a power mower that would prevent you from being a fair and impartial juror in this case?

Mrs. Finnigan: No, 'cause there was a rock in the yard and any mower would have picked it up and thrown it. That is why he doesn't allow—didn't allow the children in the yard while he was mowing, because things can be thrown out from under them.

Mr. Patterson: All right. Thank you.

Now, although the defendant's name is McDonough Power Equipment Company, like most companies they have a trade name that represents a brand for their product. This company uses the name "Snapper brand," and it has been used for quite awhile. It is marketed nationwide. Now do any of you happen to use or know of anybody who uses this Snapper—a Snapper brand of mower or power equipment?

(Reporter's Note: Response.)

Mr. Patterson: Mr. Kerns?

Mr. Kerns: Yes.

Mr. Patterson: Okay. Could you tell me what your experience or what your acquaintance with the Snapper brand is?

Mr. Kerns: Well, just casual. One of the neighbors when I lived over in Missouri had one. I think it's the kind that my father has. He has a riding mower.

Mr. Patterson: Is there anything about either your neighbor's experience or your father's experience or your experience with them that would prevent you from being a fair and impartial juror to hear this case knowing that the defendant is the manufacturer of a Snapper brand product?

Mr. Kerns: No, not in the least.

Mr. Patterson: Now, are there any among you who either yourself, anyone in your immediate family or a neighbor ever had a child injured on any kind of a mechanical device or machinery? If so, could you raise your hand.

(Reporter's Note: Response.)

Mr. Patterson: Mr. Cook, you are—you have told us about your wife, but did you also have an experience involving a child?

Mr. Cook: My boy got his finger in a bike chain once, and when he was in high school he got his hand in a power saw.

Mr. Patterson: All right. And how old was your boy when he encountered the bike chain roughly? I don't need to know exactly.

Mr. Cook: I'd say about six.

Mr. Patterson: Okay. And the same question with respect to the power saw?

Mr. Cook: I'd say 13-15.

Mr. Patterson: Okay. And either of those instances, Mr. Cook, was there any kind of a claim made on behalf of your boy against the manufacturer or the seller of either the bike or the power saw?

Mr. Cook: No.

Mr. Patterson: Any kind of a lawsuit considered by you as a result of that experience?

Mr. Cook: No.

Mr. Patterson: Is there anything about your boy's experience that would prevent you from being a fair and impartial juror to hear this case knowing that it is an action brought by a child in behalf of a child against the manufacturer of a power mower?

Mr. Cook: No.

Mr. Patterson: Now, I notice that a number of you, either yourselves or someone in your immediate family pursue occupations that involve machinery either on a production line or in some other capacity. Are there any among you who either yourself, your immediate family, close friend or a neighbor have ever been injured on any kind of a machine whether it is at home or whether it is at work, at the factory or whatever? If so, would you please raise your hand.

(Reporter's Note: Response.)

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: When my husband was working one time he was cleaning out a machine, and put his hand

in it to clean it out, and somebody turned the machine on and it stripped the back of his hand off.

Mr. Patterson: Now how long ago did that happen?

Mrs. Finnigan: Oh, that's been a long time too. About 15 years.

Mr. Patterson: As a result of that experience was there any kind of a claim made by your husband against the manufacturer of the machine?

Mrs. Finnigan: Oh, no. No, it wasn't. It didn't have anything to do with the machine, it was a human error of somebody else.

Mr. Patterson: All right. Is there anything about that experience that would prevent you from being a fair and impartial juror to hear this case, again knowing generally the type of case it is?

Mrs. Finnigan: It is a different type of thing.

Mr. Patterson: Did I miss anybody else? Anybody who has either yourself, or immediate family, or close friend or neighbor ever been injured on any kind of machinery either at work, and the same question with respect to any kind of a mechanical device at home? That could include a lawn mower, snow blower, washer, dryer, stove? I'll skip over toys such as bicycles and roller skates. Anything?

(Reporter's Note: Response.)

Mr. Patterson: Mr. Cook?

Mr. Cook: My wife when she was young got her hand in a wringer washing machine.

Mr. Patterson: How long ago did that happen, sir?

Mr. Cook: I couldn't say. Before I ever knew her.

Mr. Patterson: Okay. Do you know whether or not your wife or anyone in her family or her behalf made any kind of claim against the seller of the machine or the manufacturer of the machine?

Mr. Cook: No, I don't.

Mr. Patterson: Is there anything about your wife's experience that would prevent you from being a fair and impartial juror to hear this kind of case, I mean a claim against the manufacturer of a mower?

Mr. Cook: No.

Mr. Patterson: Anybody else?

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who either yourself or in your immediate family has ever had the misfortune of having a severe injury or a death to a small child? If so, could you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Mr. Cook, you told us about the bicycle and the power saw so we will miss (sic) that for the moment.

Anyone else? If so, could you raise your right hand, please?

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who have ever been a plaintiff, either yourself or anyone in your

immediate family ever been a plaintiff, that is the party who brings the legal action, or a defendant, that is the party against whom the action is brought, in any kind of suit involving bodily injury or death? Now that doesn't count domestic matters, just a claim for bodily injury or death? If so, could you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: The evidence that you will hear and see will consist of testimony from the witness chair at my immediate right, your left. Are there any—Mr. Cook, I believe you indicated you could hear. Can you hear me all right?

Mr. Cook: Yes.

Mr. Patterson: Is there anyone else who would anticipate having any difficulty in hearing the witness from the location that I have indicated? It would be to my right, your left. If so, could you raise your right hand.

(Reporter's Note: No response.)

Mr. Patterson: There will be some exhibits that will be passed among you that will involve, oh, printing about the size of a typewriter, possibly Pica type. I can't recall any that small, but I don't think any smaller than that. Also photographs. If any of you need glasses and forgot them are there any of you who don't have access to them? If so would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: What I'm driving at, is there any—does anybody anticipate any problem in seeing and look-

ing at exhibits should you be called upon to look at it if it is passed to you?

(Reporter's Note: No response.)

Mr. Patterson: If so, would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Now, as you have probably been told, this is a contest between a small child and a corporation that manufactures products and sells them over a wide area. I am going to be very frank with you, this is a badly injured child. There is no guessing of that fact at all. This child had an accident and the result of which he has no right foot at all, there is an amputation above the ankle. His left foot is likewise not totally gone, but it is substantially gone. It is a bad injury and it occurred when he was only three years old. That is the plaintiff. The defendant is a manufacturing corporation.

Are there any among you who would have any difficulty in viewing, seeing and evaluating the evidence just as fair to one party as you would be to the other party? Would you have any such difficulty, Mr. Barnhill?

Mr. Barnhill: No.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No, I would not.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Mrs. (sic) Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

Mr. Patterson: If you should—well, at the close of the case and after you have heard all the evidence, the law that applies to it will be given to you by the Court. That is what we call "Instructions." They will be read to you and possibly they would be in writing and given to you. That is a matter for the discretion of the Court. I cannot exercise it for him. He will make that decision. But in any event, the law that applies to the case will be given to you by the Court, and you will hear it. Should you have occasion to read it you might find that the law

that applies to the case is different from what you thought the law either was or what you think the law ought to be. Now if you should find that to be the case are there any among you who would have any difficulty in putting aside your own notion as to what the law—what you think the law either is or ought to be and in following the instructions given to you by the Court.

Would you have any such difficulty, Mr. Barnhill?

Mr. Barnhill: No, sir.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Mrs. (sic) Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

Mr. Patterson: Again, this case does involve an injury to a small child. At the conclusion of it you might have—we are all human. We can't help but have feelings for somebody as young as the plaintiff is as badly injured as he is. But should you find your sympathy that for someone who is badly injured would want to dictate one result, but the evidence as you really sit and hear it, and the law that applies to it would dictate another result are there any among you who would have any difficulty in returning a verdict that would be dictated by the evidence as you see it and hear it and the law that applies to the case should it be different than what your humanistic feelings might be?

Would you have any such problems, Mr. Barnhill?

Mr. Barnhill: No.

Mr. Patterson: Mrs. Engert?

Mrs. Engert: No.

Mr. Patterson: Mrs. Murray?

Mrs. Murray: No.

Mr. Patterson: Mrs. Wendt?

Mrs. Wendt: No.

Mr. Patterson: Mr. Hillard?

Mr. Hillard: No.

Mr. Patterson: Miss Duke?

Miss Duke: No.

Mr. Patterson: Mr. Payton?

Mr. Payton: No.

Mr. Patterson: Mrs. Gladhill?

Mrs. Gladhill: No.

Mr. Patterson: Mr. Kerns?

Mr. Kerns: No.

Mr. Patterson: Mr. Cook?

Mr. Cook: No.

Mr. Patterson: Mrs. Roose?

Mrs. Roose: No.

Mr. Patterson: Mrs. Finnigan?

Mrs. Finnigan: No.

The Court: Mr. Patterson, may I suggest that, I'm not trying to cut you off, but if you have any further questions please ask them to the panel as a group rather than individually. It takes a little less time and I'm sure they will understand and be able to answer.

Mr. Patterson: All right.

Are there any among you who have any feeling that a three-year old child who is injured on any kind of a machine automatically has a right to recover damages

against somebody regardless of any other evidence, regardless of any question of fault? Do any of you have any such feeling? Would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: Are there any among you who have any feeling or opinion to the effect that the fact a suit is filed, that fact alone, without considering any other evidence, just the fact that a suit is filed is proof that the plaintiff has a right to recover? If so, would you raise your hand.

(Reporter's Note: No response.)

Mr. Patterson: One final question. I suspect plaintiff's counsel and myself between us have thought about every question that you could possibly think of to find out what there is possibly in your background that might prevent you from being a fair and impartial juror to hear this case. In case either of us have forgotten something, are there any among you who know of any reason, whether we have asked it or not, either Mr. Schroer or myself, do you know of any reason whether we have asked it or not that would prevent you from being a fair and impartial juror to hear this case, and knowing the kind of case it is, and who the parties are, who the counsel are? If so, would you raise your hand?

(Reporter's Note: No response.)

Mr. Patterson: The defendant passes for cause, Your Honor.

The Court: All right, gentlemen, I will now ask you to exercise your peremptory challenges.

Mr. Clerk, would you take care of that, please. Go to the plaintiff first.

Mr. Clerk, would you ask the jurors excused to step aside.

The Clerk: The following jurors have been excused. As I call your name, please step down from the jury box. Steve Hillard, Joy Wendt, Harvey Barnhill, Connie Gladhill, David Kerns, Ethelyn Roose.

Will the remaining jurors move to your right, to the far right, please.

The Court: You are now the six jurors who have been selected to try this case.

Mr. Clerk, would you now call four jurors and we will select two alternates. I will give each side one peremptory challenge.

CLERK'S MINUTE SHEET, PAGE 1

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Page 1 of 3

CLERK'S COURTROOM MINUTE SHEET—
CIVIL JURY—PART ONE

CASE NO. 77-4087

BILLY G. GREENWOOD, ET AL.

R. Daniel Lykins; Gene Schroer; Dan Wool (sic)
Counsel for Plaintiff
vs.

McDONOUGH POWER EQUIPMENT, INC.

Donald Patterson; Steve Fabert,
Counsel for Defendant

Judge ROGERS

Reporter INGRAM

Clerk GOMEZ

Date: 4-09-80 4-10-80 4-14-80 4-15-80 4-16-80

T/B 9:35 a.m. 9:10 a.m. 9:15 a.m. 9:40 a.m. 9:45 a.m.

T/E 4:15 p.m. 5:10 p.m. 5:10 p.m. 4:45 p.m. 4:55 p.m.

P R O C E E D I N G S

Jury impaneled and sworn: 4-09-80

At: 11:50 a.m.

(Back Row)

(Front Row)

P-2 ~~1 Harvey A. Barnhill~~7 Marguenite J.
Finnigan

2 Carolyn S. Engert

3 Patricia S. Murray

D-2 ~~8 Ethelyn L. Reese~~P-3 ~~Joy E. Wendt~~

9 Donald E. Cook

4 ~~Max N. Frauenfelder~~P-1 ~~David S. Kerns~~D-3 ~~5 Steve L. Hillard~~10 ~~Albert J. Elser~~

6 Diane Marie Duke

D-1 ~~11 Connie S. Gladhill~~

12 Ronald R. Payton

SPECIAL VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 77-4087

BILLY G. GREENWOOD,

Plaintiff,

vs.

McDONOUGH POWER EQUIPMENT, INC.,

Defendant.

V E R D I C T

(Filed April 8 (sic), 1980)

We, the jury, duly empaneled and sworn, upon our oaths, present the following answers to the questions submitted by the Court:

(1) We find defendant:

— at fault)
) on the theory of strict
✓ not at fault) liability
 (check one)

(2) We find Jeffrey Morriss:

✓ at fault)
) on the theory of negligence
— not at fault)
 (check one)

(3) We find Ira Morriss:

✓ at fault)
) on the theory of negligence
— not at fault)
 (check one)

(4) We find Freda Greenwood:

✓ at fault)
) on the theory of negligence
 — not at fault)
 (check one)

(5) Considering the contributions of all parties found liable in the above questions at one hundred percent (100%), we find the following percentages of the total fault attributable as follows:

Defendant	0% (0%-100%)
Jeffrey Morriss	20% (0%-100%)
Ira Morriss	45% (0%-100%)
Freda Greenwood	35% (0%-100%)

TOTAL 100%

(Note: as to any party listed above, if you find no fault and so indicate in any of questions 1 through 4, enter no percentage in the appropriate space above. If you do not find any party at fault, the total must equal zero percent.)

(6) Without considering the answers to the above questions, what total amount of damages do you find was sustained by plaintiff Billy G. Greenwood?

\$375,000

/s/ Ronald R. Payton
Foreman

4/24/80
Date

(Caption Omitted)

PLAINTIFF'S MOTION TO APPROACH JURORS

COMES NOW the plaintiff, pursuant to U. S. D. C. Rule 23A and moves the Court for an Order authorizing counsel for plaintiff to approach the jurors regarding the following matters:

1. Any and all extrinsic matters considered, if any.
2. To inquire if any alternate jurors communicated with the jury during their deliberations.
3. To inquire if the jurors read any newspaper articles which appeared.
4. To inquire if any of the jurors formed or expressed any opinion before the case was submitted to them.
5. To inquire if the jurors overheard and considered any conferences at the bench between court and counsel.
6. To inquire if the jurors overheard and considered any conversations among defense counsel and their expert witnesses while in the hallway, especially as some of the jurors sat at the back of the courtroom during recess while the court attended to matters in criminal cases.
7. To inquire if the jurors faithfully adhered to the admonitions given them by the Court.
8. To inquire if the jurors truthfully answered questions on voir dire.

In support of this Motion, plaintiff shows to the Court:

1. The attached affidavit of John G. Greenwood.

2. The attached affidavit of Nancy L. Cooke.
3. That an alternate juror, Gary L. McDowell, contacted the Court, counsel for the defendant, and Mr. Greenwood at the close of the evidence.
4. That plaintiffs are of information and belief that the jury foreman's, Ronald R. Payton, wife was present during portions of the trial and plaintiffs would therefore request an opportunity to inquire if Mr. Payton discussed the testimony with his wife and formed or expressed any opinion before the case was finally submitted to him.
5. That plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions.
6. That newspaper articles did appear during the trial.

For these reasons, plaintiffs move the Court for an Order authorizing counsel to approach the jurors. Plaintiff requests an immediate hearing on this matter at the Court's earliest convenience.

JONES, SCHROER, RICE, BRYAN
& LYKINS, Chartered

By Gene E. Schroer
115 E. 7th St.
Topeka, Kansas 66603
913-357-0333
Attorney for Plaintiffs

(Certificate of Service Omitted)

(Caption Omitted)

A F F I D A V I T

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

The undersigned, John G. Greenwood, of lawful age, being first duly sworn, upon his oath, states as follows:

1. That I am the father and natural guardian of the plaintiff in this action.

2. That on our way out of the Courthouse at the close of the evidence on April 23, 1980, an alternate juror, Gary L. McDowell, was talking to Mr. Gomez; that we all said "hello" to one another, whereupon Mr. Gomez left; that Mr. McDowell questioned me regarding the following matters:

a. He was very concerned how plaintiff's attorney had obtained the case, and used the words "ambulance chaser."

b. He was concerned about the amount of plaintiff's attorney's fees.

c. He was concerned about the insurance and settlement aspects of the case.

3. That Mr. McDowell appeared to me to be in such a state of involvement in this case that I sincerely question whether he may have attempted to contact other

jurors during their deliberation, and/or expressed an opinion to the jurors during the trial of this case.

FURTHER THIS AFFIANT SAITH NAUGHT.

/s/ John G. Greenwood
JOHN G. GREENWOOD

Subscribed and sworn to before me this 24th day of April, 1980.

/s/ Nancy L. Cooke
NOTARY PUBLIC

My appointment expires:
10-11-80

(Caption Omitted)

A F F I D A V I T

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

The undersigned, Nancy L. Cooke, of lawful age, being first duly sworn, upon her oath, states as follows:

1. That I am personal secretary and legal assistant to plaintiff's counsel, Gene E. Schroer.

2. That I was present during the trial of the above captioned matter, sitting in the back of the courtroom.

3. That occasionally I could overhear portions of conferences at the bench.

4. That occasionally I could overhear portions of hallway conferences among defense counsel and expert witnesses when jurors were sitting in the near vicinity.

FURTHER THIS AFFIANT SAITH NAUGHT.

/s/ Nancy L. Cooke
NANCY L. COOKE

Subscribed and sworn to before me this 28th day of
April, 1980.

/s/ Pamela J. Eichman
NOTARY PUBLIC

My appointment expires:
5-16-83

(Caption Omitted)

DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO APPROACH JURORS

Comes now the defendant, pursuant to Rule 23 A,
U.S.D.C. Kan., and opposes plaintiff's Motion to Approach
Jurors unless such approach is made under the following
conditions:

1. Defense counsel is present and is notified of the
time and place when such approach is to be made
by plaintiff's counsel.
2. The approach is made in the presence of the
Court, or a Magistrate Judge of the above-named
Court.
3. A record is made so that the questions asked of
the jurors can be recorded and will be known.

Defendant contends that such precautions are neces-
sary to avoid undue influence and pressure placed upon
jurors concerning the manner in which they discharged

their public duty performed in response to a jury summons.

Respectfully submitted,

FISHER, PATTERSON, SAYLER
& SMITH

520 First National Bank Tower

Topeka, Kansas 66603

Phone 913-232-7761

By: Donald Patterson

Attorneys for Defendant

(Certificate of Service Omitted)

(Caption Omitted)

MEMORANDUM AND ORDER DENYING
PLAINTIFF'S MOTION TO APPROACH JURORS

(Filed April 30, 1980)

This products liability action was tried to a jury for some nine days before the jury returned answers to questions propounded by the Court which resulted in a judgment in defendant's favor. The case now comes before the Court upon plaintiff's motion to approach the jurors. The motion is made pursuant to Local Rule No. 23A, which reads as follows:

Lawyers appearing in this court, as well as their agents or employees, shall refrain from approaching jurors who have completed a case, unless authorized by the Court. Such authorization will be considered only upon formal application to the Court and hearing at which just cause shall be shown.

The scope of inquiry proposed by plaintiff is quite broad. In an attempt to show "just cause" for the request,

plaintiff observes: (1) an alternate juror contacted the Court, counsel for defendant, and plaintiff's father after the jury had retired for deliberation; (2) the jury foreman's wife was present during portions of the trial; (3) the plaintiff is of recent information and belief (such being of undisclosed origin) that the jury foreman's son may have been injured at one time, which the foreman did not state in response to voir dire questions; (4) that newspaper articles did appear during the trial; and (5) one Nancy L. Cooke, while sitting in the courtroom (a) occasionally could overhear portions of conferences at the bench, and (b) occasionally could overhear portions of hallway conferences among defense counsel and expert witnesses when jurors were sitting in the near vicinity.

To accept these contentions as "just cause" for purposes of Rule 23A would require the Court to infer misconduct and conclude that the jurors had ignored the Court's repeated instructions on the basis of absolutely no concrete evidence whatsoever. The jury was instructed to ignore any media reports of the trial, to disregard any statements made during bench conferences, to disregard any information which did not emanate from the "four walls" of the courtroom, and to refuse to discuss the case with any person, including spouses. There is absolutely no direct evidence that any of these admonitions of the Court was not followed by the six jurors who decided this case. The matters asserted by plaintiff are rather mundane and of a type which is likely to arise in any trial. To read these allegations as constituting "just cause" would be to strip Rule 23A of any force and effect it was meant to have.

As we have stated in earlier opinions [*see United States v. Paden*, No. 79-40006-01 (D. Kan., 11/9/79, unpublished)], Rule 23A is an expression of this district's concurrence in the general rule that interviews of jurors by persons connected with a case are not favored by the federal courts except in extreme situations. *Stein v. New York*, 346 U.S. 156, 178 (1953); *McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 156 (1892).

The rationale for such a local rule is eloquently and forcefully explicated by Chief Judge Theis in his opinion in *Silkwood v. Kerr-McGee Corp.*, No. CIV-0888 (W.D. Okl., 6/20/79, unpublished). The statements made in that opinion are fully applicable here. Rather than retrace Judge Theis' persuasive discussion, we shall merely append a copy of that decision to this opinion. We deem the reasoning of that case controlling here.

IT IS THEREFORE ORDERED that plaintiff's motion to approach jurors be, and it is hereby, denied.

Dated this 30th day of April, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Caption Omitted)

MEMORANDUM ORDER

This matter comes before the Court on the application of counsel for defendants for permission to interrogate the jurors who deliberated in this case. Local Rule 29(B) (5) of the Western District of Oklahoma requires

that lawyers "refrain from approaching jurors who have completed a case unless authorized by the Court." Defense counsel have filed a formal motion and brief in support of their application.

Because counsel fail to allege a basis sufficient to justify the interviews comprehended by the local rule, as indicated by the Chief Judge of the district in *United States v. Hall*, 424 F. Supp. 508 (W.D. Okla. 1975) (Daugherty, C.J.), *affirmed*, 536 F. 2d 313 (10th Cir. 1976), public policy and judicial disfavor for such post-trial conduct require that this Court deny counsel's application. The Court must order that neither counsel in this lawsuit nor their employees or agents approach any juror in this case for discussion of the litigation. On the record established in counsel's pleadings, this result comports with the vast majority of case law on this point.

Interviews of jurors by persons connected with a case have never been favored by the federal courts except in extreme situations. *Stein v. New York*, 346 U.S. 156, 178 (1953); *McDonald v. Pless*, 238 U.S. 264 (1915); *Mattox v. United States*, 146 U.S. 156 (1892). The reasons for this judicial disfavor should be obvious. In *Clark v. United States*, 289 U.S. 1, 13 (1933), Justice Cardozo spoke of the traditional judicial reluctance to permit inquiry into jury conduct:

"For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid."

The proper functioning of the jury system requires that the courts protect jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which establish misconduct sufficient to set aside a verdict." *McDonald v. Pless*, supra, at 267; *United States v. Moten*, 582 F. 2d 654, 664 (2d Cir. 1978); *United States v. Crosby*, 294 F. 2d 928, 950 (2d Cir. 1961). The Fourth Circuit has felt this policy so significant as to condemn unequivocally the practice of post-trial interrogation of jurors by persons connected with the litigation. In *Rakes v. United States*, 169 F. 2d 739, 745-46 (4th Cir. 1948), the Court stated:

"The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

Limits on the post-trial inquiry into jury verdicts are also necessary in the interest of finality, lest judges "be-

come Penelopes, forever engaged in unravelling the webs they wove." *United States v. Moten*, supra, at 665, quoting *Jorgenson v. York Ice Machinery Corp.*, 160 F. 2d 432, 435 (2d Cir. 1974) (L. Hand, J.). Congress passed the amended, present version of Rule 606(b), Federal Rules of Evidence, in part to limit the scope of any potential interviews or interrogation of jurors who sat on a case. The Senate Report that accompanied the legislation stated:

"Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606(b) should not permit any inquiry into the internal deliberations of the jurors."

Senate Comm. on the Judiciary, *Rules of Evidence*, S. Rep. No. 1277, 93rd Cong. 2d Sess., reprinted in [1974] U. S. Code Cong. & Ad. News 7051, 7060.

These same policies and concerns are part of the jurisprudence of this judicial district and are implicitly reflected in Local Rule 29(B) (5). In *United States v. Hall*, supra, Chief Judge Daugherty had before him a defense counsel's application to interview the jurors following a criminal conviction. There (as here, counsel sought to discover whether the substantial news media publicity of the trial had improperly reached the jurors. Counsel, however, made no specific allegations that extraneous information had been brought to the jury's attention, nor was any reasonable basis shown for cause to

believe that it had. Following the decisions of the Second Circuit, Judge Daugherty denied counsel's application. He quoted from *United States v. Crosby*, supra, at 950:

"There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain."

United States v. Hall, supra, at 538. Judge Daugherty further quoted from *United States v. Miller*, 284 F. Supp. 220 (D. Conn.), affirmed, 403 F. 2d 77 (2d Cir. 1968) (Friendly, J.):

"To maintain the integrity of our jury system for reaching final decisions requires that its internal process shall be inviolable, even in court proceedings. Any inquiry outside that area which may be permitted of them ought be adequately restricted to safeguard that integrity.

• • •

"Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible."

United States v. Hall, supra, at 538.

This salutary rule has developed in numerous circuits, as well as in this judicial district. It becomes proper to question jurors only when reasonable grounds exist to cause the Court to believe that the jury may have been improperly exposed to extraneous influence or information. This is the Court's determination. An applicant

must demonstrate the existence of this juror misconduct through a clear, strong, or incontrovertible showing, and mere speculation or hypothesis is not sufficient to warrant further intrusion into the jurors' lives and thoughts. *King v. United States*, 576 F. 2d 432, 438 (2d Cir. 1978).

To borrow again from Judge Daugherty's language, counsel's application in the absence of any such showing amounts to nothing more than "browsing among the thoughts of the members of the jury." These interviews "would amount to a pure fishing expedition inspired by adverse verdicts." *United States v. Hall*, supra, at 539. Judge Daugherty condemned such practice as useless and harmful to the jury system. *Id.*

To some extent, this view is shared by virtually every Court of Appeals in the country that has passed on the question. One of the preeminent jurists in this country, Judge Friendly, of the Second Circuit Court of Appeals, has characterized the "systematic, broadscale, posttrial inquisition of the jurors" as "reprehensible" in an opinion relied upon by Judge Daugherty in *United States v. Hall*, supra. *Miller v. United States*, supra, 403 F. 2d at 81. See also *Peterman v. Indian Motorcycle Co.*, 216 F. 2d 289, 293 (1st Cir. 1954); *United States v. Dioguardi*, 492 F. 2d 70 (2d Cir. 1974); *United States ex rel. Daverse v. Hohn*, 198 F. 2d 934 (3rd Cir. 1952) (disapproving in general the practice of post-trial interviews); *Rakes v. United States*, supra; *Dickinson v. United States*, 421 F. 2d 630 (5th Cir. 1970) (jurors should not be exposed to "fishing expeditions"); *United States v. Franks*, 511 F. 2d 25 (6th Cir. 1975); *Stephens v. City of Dayton, Tenn.*, 474 F. 2d 997 (6th Cir. 1973) (abuse of discretion to authorize in-

terrogation where party sought to impeach verdict); *Bryson v. United States*, 238 F. 2d 657 (9th Cir. 1956); *Northern Pac. Ry. v. Me'y*, 219 F. 2d 199 (9th Cir. 1954); *United States v. Narcisco*, 446 F. Supp. 252, 324 (E. D. Mich. 1977); *United States v. Brasco*, 385 F. Supp. 966, 970 n. 5 (S. D. N. Y. 1974), *aff'd.*, 516 F. 2d 816 (2d Cir. 1975); *United States v. Sanchez*, 380 F. Supp. 1260, 1265 (N. D. Tex. 1973) (Brewster, J.) (practice of unbridled interviews described as "disgusting"), *aff'd.*, 508 F. 2d 388 (5th Cir. 1975); *Gilroy v. Eric Lackawanna R. R.*, 279 F. Supp. 139 (S. D. N. Y. 1968).

Absent clear evidence of extraneous influence or information improperly brought to the jury's attention, courts have uniformly denied counsel leave to conduct post-trial interviews of jurors. *King v. United States*, *supra* ("frail and ambiguous showing"); *United States v. Eagle*, 539 F. 2d 1166, 1171 (8th Cir. 1976) (no specific allegations of improper acts); *United States v. Franks*, *supra*; *United States v. Green*, 523 F. 2d 229 (2d Cir. 1975); *United States v. Dye*, 508 F. 2d 1226, 1232 (6th Cir. 1974); *Smith v. Cupp*, 457 F. 2d 1098 (9th Cir. 1972) (no specific claim of misconduct); *United States v. Allied Stevedoring Corp.*, 258 F. 2d 104 (2d Cir. 1958) (speculation not deemed "adequate grounds"); *Capella v. Baumgartner*, 59 F. R. D. 312 (S. D. Fla. 1973) (speculation that impropriety might have occurred found insufficient); *United States v. Driscoll*, 276 F. Supp. 333 (S. D. N. Y. 1967), *reversed on other grounds*, 399 F. 2d 135 (2d Cir. 1968).

Counsel states that it would be error to deny the application and implies that the Court lacks authority to

intervene in the lawyers' or parties' interrogation of jurors. These assertions are both patently unsupportable. A district judge has the power—indeed, in some cases he or she has the duty—to order that all post-trial investigation of jurors shall be under supervision of the court and restricted to matters the court deems relevant and proper. *United States v. Moten*, supra, at 665-66; *Miller v. United States*, supra, at 81-82 (Friendly, J.); *United States v. Franks*, supra; *United States v. Brasco*, 516 F. 2d 816, 819 n. 4 (2d Cir. 1975).

Some courts have approved the practice that attorneys must petition the court before contacting any juror. *United States v. Riley*, 544 F. 2d 237 (5th Cir. 1976); *United States v. Brasco*, supra; *Beanland v. Chicago R. I. & Pac. R. R.*, 345 F. Supp. 227 (W. D. Mo. 1972). Some jurisdictions require that all attorney-juror contact be strictly regulated by the court. *United States v. Winters*, 434 F. Supp. 1181 (N. D. Ind. 1977); *Womble v. J. C. Penney Co.*, 47 F. R. D. 350 (E. D. Tenn. 1969). It is the duty of this Court to insure that the zealotry of counsel does not impair the proper functioning of the jury system.

Defense counsel in this case have not made any showing of improper introduction of outside information or influence into the deliberations that would cause this Court to conduct an inquiry into the area of the jury's deliberations permitted by Rule 606(b). Counsel do not even speculate that there might have been such misconduct. Rather, they seek leave to interrogate the jurors to determine whether any such misconduct might have occurred. Coun-

sel also state that the interviews are for additional purposes as well.

This is the precise type of broadscale inquiry into jury deliberations criticized by Judge Friendly in *Miller v. United States*, supra, by the Fourth Circuit in *Rakes v. United States*, supra, and by the district court in *United States v. Driscoll*, supra. Counsel's application is sufficiently similar to that ruled upon by Judge Daugherty in *United States v. Hall*, supra, to fall within the rubric of those interviews that ought properly to be forbidden by the district courts. Absent a sufficient, specific showing of Rule 606(b) misconduct, counsel's application must be denied. Other possible information gained through post-trial questioning of jurors, which does not fit within Rule 606(b), would serve no legitimate legal purpose. It would not justify the interviews sought here.

Counsel argue that a rule barring interviews until a showing has been made precludes the use of the sole means by which a showing can be made. This argument, however, was found unpersuasive by Judge Friendly when he spoke to Congress regarding the amendment to Rule 606(b). See *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93rd Cong. 1st Sess. No. 2, 250, 256 (1974). The eminent jurist there indicated that the situation did not warrant the investigation of the jury's deliberations sought by counsel. Counsel here should be reminded that it is the jurors' duty to be conscientious in reporting to the Court any misconduct that occurs during jury deliberations. H. R. Conf. Rep. No. 1597, 93rd Cong. 2d Sess., reprinted in [1974] U. S. Code Cong. & Ad. News 7051, 7102.

This Court, however, has additional reasons for denying the application of counsel. First is the jurors' indication to this Judge that they sought to avoid the publicity and intrusion that private interviews would involve. Each juror communicated to this Judge his or her desire to avoid interviews with the parties, their lawyers, or with the press. The jurors agreed among themselves not to discuss the case or their deliberations with others, and they informed this Judge of that desire. This attitude is commendable on their part.

This Court has recently spoken by telephone with the jury's forewoman, who stated that this is still her own desire and her understanding of the desires of the other jurors from post trial communications with them. The Court must add that upon his inquiry, the forewoman responded that at no time was any extraneous information or influence brought to the jury's attention. She stated that none of the publicity regarding this trial or any other nuclear incidents or viewpoints occurring during the time of trial was brought into the jury's deliberations, and that no one approached any juror with comments about the case during its pendency. She indicated that each juror understood that if such took place, or if outside information or influence was brought to the jury's attention, the jurors had the duty to so inform the Court immediately. This jury had a correct apprehension of their oath and obligations.

The Court further notes the inevitable consequence of permitting counsel to interview the jurors in this case. Since the conclusion of this trial, numerous comments have been published regarding the verdict in this case and

its possible effects. The publicity surrounding the verdict has been substantial and national in scope. To represent that various news media have demonstrated an abiding interest in the most detailed minutiae of every aspect of this case would be a miracle of understatement. Eliciting statements of jurors on this case, regardless how innocuous those statements might be, would doubtless lead to public debate over the deliberations, the verdict, and possibly over the individual jurors themselves, all of which the rules of evidence would forbid in a court of law. This could only lead to a distortion of truth, the creation of misunderstandings, and quite possibly to a significant impairment of our system of justice—in all, a “Pandora’s box of ill effects more than offsetting any benefit” derived from the inquiry. See 120 Cong. Rec. H550-51 (daily ed. Feb. 6, 1974) [remarks of Rep. Wiggins on amendment to Rule 606(b)]. Counsel’s application, as it is presented to this Court, is insufficient to warrant leave to interview the jurors in this case.

The jurors in this case did not volunteer for service but were selected after an intensive voir dire examination by both the Court and counsel for the parties to eliminate any possible prejudice and to impress on them the solemnity and scope of their duties as jurors. The jurors were a most representative group of Oklahoma citizens of both sexes, ages, various employments, and excellent intellectual capacity. They served as required by their government and the laws of this country. In view of the public interest manifested in the trial, the complexity of some of the evidence on the scientific matters, and the inordinate length of trial time, they did so only at great sacrifice to themselves and their families. All counsel in

this case, and this Judge himself, commended these jurors for their admirable performance of a very difficult task under very taxing circumstances. The individual jurors in this case, including the four alternates who dutifully served, impressed the Court, his staff, and the lawyers in this case, with their attentiveness and conscientiousness. The few comments of jurors that appeared in local Oklahoma City newspapers after the trial reflected that the jurors understood this Court's admonition and governed themselves by its terms. There is absolutely no basis on these facts to support any further inquiry of the jurors.

At the close of this case the jurors expressed their desire to retreat from the public eye before which they had been placed, and to return to their private lives. Several, however, have regretfully received numerous communications from unknown individuals across the country who offer gratuitous comments on the verdict reached. Such intrusions into the private lives of these citizens are unfortunate and unwarranted. Continued public exposure of the jurors and their thoughts and feelings about this case, which would likely follow interviews with counsel, would only exacerbate this situation. The Court has a vital interest in seeing that jurors are not harassed or placed in doubt about what their duty is and that false issues are not created. *Miller v. United States*, supra, at 82. Absent a proper showing by counsel, the Court must deny the application.

IT IS THEREFORE ORDERED that the application of defense counsel for authorization to interview the jurors in this case is hereby denied.

IT IS FURTHER ORDERED that all counsel in this case, their agents and employees, refrain from interviewing any juror who sat in this case regarding the litigation without first seeking leave of Court.

At Wichita, Kansas, this 20th day of June, 1979.

/s/ Frank G. Theis
United States District Judge

(Captioned Omitted)

PLAINTIFF'S SECOND MOTION TO
APPROACH JURORS

Comes now the plaintiff, pursuant to U. S. D. C. Rule 23A, and moves the court for an Order allowing counsel for plaintiff to approach the jurors in this matter regarding those matters set forth in plaintiff's First Motion, and for the following reasons:

1. All grounds previously urged;
2. The Affidavit of John G. Greenwood, attached;
3. Rule 23A and the court's Order pursuant to same rule violates the First and Fifth Amendments to the United States Constitution.

Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had ever been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions

been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Accordingly, for all the above reasons, plaintiff moves the court for an Order allowing counsel for plaintiff to approach the jurors.

JONES, SCHROER, RICE, BRYAN
& LYKINS, Chartered

By Gene E. Schroer

115 East Seventh Street
Topeka, Kansas 66603
(913) 357-0333

Attorneys for Plaintiff

(Certificate of Mailing Omitted)

(Caption Omitted)

A F F I D A V I T

I, JOHN G. GREENWOOD, of lawful age, being first duly sworn upon oath depose and state:

1. That I am employed as Recruiter in Charge, Navy Recruiting Station, Topeka, Kansas;

2. That one Mr. Payton, son of jury foreman Payton, made application to enlist in the Navy;

3. That since the conclusion of the trial, herein, it has come to my attention that said Mr. Payton is the son of jury foreman Payton;

4. That in the regular corse (sic) of my employment as a navy recruiter I reviewed the application of said Mr. Payton;

5. Said application indicates that said Mr. Payton was seriously injured in an explosion of a truck tire.

/s/ John G. Greenwood
JOHN G. GREENWOOD

STATE OF KANSAS)
) SS:
COUNTY OF SHAWNEE)

BE IT REMEMBERED that on this — day of May, 1980, before me, the undersigned, a Notary Public in and for the County and State aforesaid, appeared John G. Greenwood, who is personally known to me to be the person who executed the foregoing Affidavit, and such person duly acknowledged the execution of the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year last above written.

Notary Public

My appointment expires:

(Captioned Omitted)

ORDER GRANTING PLAINTIFF'S SECOND
MOTION TO APPROACH JURORS

(Filed May 5, 1980)

This case comes before the Court upon plaintiff's renewed and supplemental motion to approach jurors pursuant to Local Rule 23A.

Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.

The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.

Counsel should be informed that the Court's review of the court reporter's notes of *voir dire* indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged *and* (2) the son sustained a disability or suffered prolonged pain.

Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products

liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side.

We note further that nondisclosure of information by a juror on *voir dire* is generally not grounds for a new trial unless (1) the juror was guilty of intentional deception, or (2) plaintiff can show clear prejudice. *See* 47 Am. Jur. 2d *Jury* §§ 208-210 (1969); 66 C.J.S. *New Trial* § 22 (1950).

We expect counsel's inquiry to be in keeping with the spirit of Local Rule 23 A.

IT IS THEREFORE ORDERED that the plaintiff's second motion to approach jurors be generally denied, except as to the limited inquiry of juror Payton under the conditions specified herein.

Dated this 5th day of May, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

(Captioned Omitted)

PLAINTIFF'S MOTION FOR A NEW TRIAL

COMES NOW the plaintiff, pursuant to F. R. Civ. P. 59 and move this Court for an Order granting the plaintiff a new trial on the grounds set forth below.

MEMORANDUM

1. Error in granting "Defendant's Motion in Limine" (treated as summary judgment) on warnings in the Order of March 14th, 1980. The Court granted defendant summary judgment on the issue of the inadequacy of the warnings given. At the trial, the Court sustained defendant's objection to plaintiff's attempts to show the inadequacy of the warnings, on the grounds that the issue of warning was out of the case, yet allowed the defendant to present evidence that Ira and Jeff Morris failed to read and heed their warnings. This was patently unfair and obviously prejudicial in light of the fault apportioned to both Ira and Jeff Morris.

2. Error in denying plaintiff's "Motion in Limine" in the Court's Order of March 14th, 1980. The plaintiff reasserts his objection to all evidence of compliance with industry custom and practice, compliance with voluntary safety standards, and all evidence concerning the promulgation or non-promulgation of mandatory safety standards since 1972. In addition to the authorities cited in plaintiff's Motion in Limine and the briefs in support of said motion, plaintiff would refer the Court to the case of *Holloway v. J. B. Stevens, Ltd.*, — F.2d — (3d Cir. Nov. 26, 1979), 48 U.S. Law Week 2415 (No. 24, Dec. 18, 1979), 7 Product Safety & Liability Rptr. 950.

3. Error in overruling plaintiff's Second Motion in Limine and objections made at trial on evidence that Ira Morris disconnected the ignition interlock switch.

4. Error in overruling plaintiff's objections at trial regarding other evidence, i. e. muffler, grass catcher, chute

extension, on the condition of the mower which admittedly had nothing to do with the injury.

5. Error in overruling plaintiff's Motion to Reinstate Defects Claimed in the Pretrial Order, after having overruled plaintiff's Second Motion in Limine.

6. Error in denying plaintiff's Motion to Amend the Pretrial Order to claim punitive damages, after having overruled plaintiff's Motion in Limine, forcing plaintiff into the posture of trying this case against the entire industry.

7. Error in sustaining defendant's objection during the direct testimony of Professor Severt to evidence of the durability of the blade brake clutch.

8. Error in allowing improper cross examination of Professor Severt (see "Suggestions Regarding Evidentiary Rulings during the Cross Examination of Plaintiff's Expert," filed April 14th, 1980), and admitting into evidence defendant's exhibit "G-1," Severt paper number 76-402.

9. Error in admitting into evidence defendant's exhibit "K," (1972 ANSI Standards) and in allowing defendant to show compliance with same.

10. Error in admitting into evidence defendant's exhibits "L" (Consumer Product Safety Commission Safety Standards for Walk-Behind Mowers, 2/15/79), "M" (Consumer Product Safety Commission Proposed Safety Standard, 5/5/77), "R" (Consumers Union Proposed Safety Standard), "S" (Consumers Union Rationale for Proposed Safety Standard), "T," "U," "V," and "W" (minutes of the blade contact sub-committee of Consumers

Union), "X" (McDonough letter to Professor Severt dated 5/23/75), "Y" (McDonough letter to Professor Severt dated 10/6/75), and "A-1," (Consumers Union Task Force Rationale and Report).

11. Error in admitting into evidence parts of the deposition of Joseph Silbereis regarding evidence of testing performed on the McDonough mower by United States Testing Company.

12. Error in allowing Mr. Jackson, listed as an expert witness by defendant, to testify in support of his opinion about the fact that the blade bar was not the original blade bar installed on the machine, when said fact was not disclosed in answers to interrogatories and surprised the plaintiffs.

13. Error in declining to give plaintiff's requested instructions, filed April 21st, 1980.

14. Error in overruling plaintiff's objections to the Court's instructions, filed April 21st, 1980.

15. Error in overruling plaintiff's objections to the Court's revised instructions, filed April 22, 1980.

16. Error in comment by the Court on evidence in the presence of the jury, and in commenting on defendant's objections and admonishing plaintiff's counsel in the presence of the jury.

17. Error in returning the jury to further deliberate after the jury had returned a verdict contrary to the Court's instructions.

18. Error in denying plaintiff's motions to approach the jurors, thus depriving plaintiff of the opportunity to

present evidence of juror misconduct in support of this motion.

Plaintiff incorporates herein by reference all arguments and authorities shown to the Court in the above referenced pleadings and those in plaintiffs' (sic) trial brief. Accordingly, plaintiff moves the Court for an Order granting him a new trial in this matter.

Plaintiff requests oral argument on this motion, and requests leave of Court to subpoena the jurors to give testimony at the hearing on this motion.

JONES, SCHROER, RICE, BRYAN
& LYKINS, Chartered

By Gene E. Schroer
115 E. 7th Street
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(913) 357-0333
Attorney for Plaintiff

(Certificate of Mailing Omitted)

(Caption Omitted)

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff filed a motion pursuant to Rule 59, F. R. C. P. Following the motion in a section labeled "Memorandum", plaintiff set out what appears to be grounds which defendant will attempt to answer paragraph by paragraph. The number designation of the defendant will correspond to the numbered paragraphs of the plaintiff's Memorandum:

1. WARNINGS

The ruling of the Court was correct. Defendant gave a warning which appeared in the manual (Defendant Exhibit A). The manual was offered and received into evidence without objection. Certainly the defendant ought to be entitled to show the warning that was actually given, regardless of whether or not it was ever read. The Court ruled the warning issue out of the case because of the fact that the warning that was given, whether or not it was adequate or inadequate, was never read. The uncontradicted evidence was that it was placed into a bureau drawer and remained there until after the accident occurred. Neither the buyer of the mower, Ira Morriss, nor his son, Jeffrey Morriss, the operator, ever read the manual prior to the accident. Assuming but without admitting plaintiff is correct that the warning in the manual was inadequate, the inadequacy had no causal connection whatever with the accident since it was never read. The defendant has a right to assume that those warnings which are adequately given may be heeded. *Brooks v. Dietz*, 218 Kan. 698, 545 P. 2d 1104; § 402 A *Restatement of Torts 2d*, Comment j; *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 F. 2d 1383. The evidence further showed that failure to follow some of the warnings given did indeed contribute to the accident, and constituted part of the fault of Ira Morriss and Jeff Morriss.

2. EVIDENCE OF COMPLIANCE WITH INDUSTRY CUSTOM AND PRACTICE, VOLUNTARY SAFETY STANDARDS, ETC.

This point was covered at length in defendant's Memorandum Brief in Opposition to Plaintiff's Motion in Limine filed August 16, 1979, and will not be repeated here.

Defendant does wish to refer the Court to it, however. Even though plaintiff did not agree, some of the defendant's experts testified that the 1972 ANSI Standards were reflective of the state of the art. (Testimony of Gilbert Buske) To a lesser degree, Mr. Chalmers agreed. Even Mr. Severt agreed that some of the other standards that were considered but not adopted after 1972 were reflective of the state of the art at the time they were considered. In essence, Bertram Strauss said the same thing, since he authored some of the documents that constituted the proposed standard itself, and the rationale which explained the adoption of the standard. All of this information, by the admission of these witnesses, was evidence of the state of the art at the time or what various engineers and experts thought was the state of the art at the time. There can be no question but what evidence of the state of the art, as defined by the Court, is relevant to the issue of consumer expectations. *Bruce v. Martin-Marietta Corp.*, 544 F. 2d 442 (10 Cir. 1976). See also *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 632, 549 P. 2d 1383.

3. DISCONNECTION OF IGNITION SWITCH BY IRA MORRISS

Plaintiff's entire case was hinged upon the fact that the machine should have been equipped with a deadman blade brake; that it would not have been inconvenient in use; that it would have been operational; and that it would have been used. The defense evidence was to the effect that safety devices, if inconvenient, have been known to be bypassed by customers, and this is a legitimate concern of the feasibility of any safety device being considered. The fact that the owner in question was capable of bypass-

ing a safety device is highly relevant on the issue of causation between a safety device proposed by the plaintiff, which contained some inconvenient features, and the manner in which the relevant owner in fact reacted to it. The evidence was relevant therefore on the issue of causation.

4. CONDITION OF MUFFLER, GRASS CATCHER, CHUTE EXTENSION, ETC.

These admittedly had nothing to do with the accident but they do show the care and treatment the mower received at the hands of Ira Morriss. There is evidence to show that the machine had been altered subsequent to the time the accident occurred in a relevant manner. The witness Silbereis testified that when the machines left the factory, the blade travel was entirely within the housing. Immediately after the accident occurred, the blade travel of both the original blade and the substitute blade on the mower at the time the accident occurred was below the deck. Sometimes a material alteration in a product exonerates a manufacturer as a matter of law. *Texas Metal Fabricating Co. v. Northern Gas Products Corp.*, 404 F. 2d 921 (10 Cir. 1968). On other occasions the question of proximate cause is one of fact if it includes the issue of foreseeability. *Blim v. Newberry Industries, Inc.*, 443 F. 2d 1126 (10 Cir. 1971). The question of whether or not the blade travel was altered because of the abuse or misuse by Ira Morriss was an issue before the jury, and the care and treatment the mower received generally was relevant to that issue.

5. PLAINTIFF'S MOTION TO REINSTATE DEFECTS CLAIMED IN THE PRETRIAL ORDER

On March 14, 1980, the Court ruled that with respect to improper dynamic stability, lift-off, confusing foot controls, plaintiff conceded the defendant's position. These had no causal connection whatever with the injury that occurred. The Court was correct in eliminating them from the case. If the paragraph refers to negligence and breach of implied warranty, the Court was within his discretion in disallowing the amendment at that late date.

6. PUNITIVE DAMAGES

The Court was within his discretion in denying plaintiff's request to amend to include punitive damages. This is another issue, requiring a different standard of proof and different elements and would have forced the defendant into extensive trial preparation beyond that which had already been made. Trial was already in progress and the timing of the motion was most inappropriate. Defendant cannot understand the plaintiff's contention that plaintiff was forced into a position of trying the case against the entire industry. One of the concepts of "unreasonably dangerous" is consumer expectations. This evidence can include state of the art at various times, and witnesses of the defendant testified that various standards, proposed standards, and performance specifications being considered for standards were reflective of the state of the art at the time of their adoption or consideration. See *Bruce v. Martin-Marietta Corp.*, supra.

7. DURABILITY OF THE BLADE CLUTCH BRAKE

Objections were sustained initially to questions pertaining to the durability of the defendant's blade clutch brake. The condition of the blade clutch brake had no causal connection whatever with the accident since it was never used, and its condition had no effect whatsoever upon the operator's failure to use it. The Court later reversed this position on plaintiff's counsel's statement that he would "connect" the condition of the brake with the case later on, but he never did. Plaintiff was permitted to show the condition of the brake, and its durability, through the cross-examination of witnesses Boylston and Jackson so any objections that were sustained during the direct examination of Professor Sevart were not prejudicial to the plaintiff since the same information paraded before the trier of fact by other means. The evidence would have simply been cumulative of other evidence obtained by plaintiff's cross-examination of witnesses Jackson and Boylston.

8. DEFENDANT'S EXHIBIT "G-1"

This was a paper authored by Professor Sevart entitled "Development of Performance Criteria and Test Procedures for a CPSC Mandatory Safety Standard for Power Lawnmowers". This was most relevant because in it Mr. Sevart admitted that the end result of his efforts, the mandatory standard proposed by Consumers Union to the Consumer Product Safety Commission was "a quite meaningful standard". This standard included some blade stopping times that were quite different than those proposed by Professor Sevart and is evidence of the fact that he felt that the standard was reflective of the

state of the art at the time it was developed, which was subsequent to the date of manufacture of the mower in question. It could, and possibly did have an impeaching effect upon the direct examination of Professor Sevart and was properly received.

9. DEFENDANT'S EXHIBIT "K"—1972 ANSI STANDARDS

These standards were received for a limited purpose. The Court ruled in Instruction No. 9 that such information could be considered by the jury on the issue of reasonable expectation of consumers, and the feasibility of safety devices which plaintiff claims should have been on the defendant's mower but were not. The relevance of industry standards is made clear under substantive law of Kansas in *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P. 2d 1383 (Kan. 1976). Other witnesses testified that they were the equivalent of the state of the art at the time. (Testimony of Buske). State of the art evidence is relevant to the issue of consumer expectations. *Bruce v. Martin-Marietta Corp.*, 544 F. 2d 442 (10 Cir. 1976).

10. DEFENDANT'S EXHIBITS SHOWING ACTIVITIES OF AUTHORS OF STANDARDS AND PROPOSED STANDARDS

Defendant's Exhibits "L" (Consumer Product Safety Commission Safety Standards for Walk-Behind Mowers), "M" (Consumer Product Safety Commission Proposed Safety Standard 5/11/77); "R" (Consumers' Union Proposed Safety Standard); "S" (Consumers Union Rationale for Proposed Safety Standard), "T", "U", "V", and "W" (Minutes of the Blade Contact Subcommittee of Con-

sumers Union) are all reflective of the state of the art of blade stopping devices on the date they bear, which was subsequent to the date of manufacture of the mower in question. The state of the art revealed a stopping device that had a stopping time much slower than any that would have been effective in stopping the accident in question. It was relevant therefore both on the issue of consumer expectations, and proximate cause. See *Bruce v. Martin-Marietta Corp.*, supra. The exchange of correspondence between McDonough and Professor Severt concerning the mower that Professor Severt purchased, or assisted in purchasing (Defendant's Exhibits "X" and "Y") serve to impeach Professor Severt on his opinion of the defectiveness of the condition of the mower subsequent to the date of manufacture of the mower in question but prior to the occurrence of the Greenwood accident. They were admissible for impeachment purposes.

11. SILBEREIS DEPOSITION

The condition of the mower at the time it left the hands of the manufacturer is certainly relevant. The portion of the Silbereis deposition read by the defendant concerned the condition of the mower, with respect to the position of the blade travel in relationship with the blade housing. Since a blade travel below the housing was a defect relied upon by plaintiff, the non-existence of such defect at the time it left the hands of the manufacturer was relevant and proper. Although the record will correct defense counsel if correction is needed, at the time of this writing he can recall no objection being made by the plaintiff to such reading.

12. ORIGIN OF THE SUBSTITUTE BLADE BAR

Rule 26(b) (4) requires the defendant to reveal the name and address of his experts, the subjects upon which he will give an opinion; the substance of the opinion, and the factual basis for each opinion. The information was simply an observation made by Mr. Jackson. It did not form the basis of any opinion that he gave. In fact defendant cannot recall any opinion solicited from Mr. Jackson. He simply testified concerning what he did; what he saw; and what he observed. Plaintiff was given two opportunities to secure his discovery deposition. One was in Topeka, Kansas, in June of 1977, and the other was in McDonough, Georgia, in September, 1977. The information was not obtained from Mr. Jackson but through no fault of the defendant. There was no error in allowing Mr. Jackson to testify to what he observed. Bars and blades were removed from the mower after the accident and prior to the time it was observed by any of the defendant's personnel. Certainly there could have been plenty of opportunity for error in mixing up blades and bars, but if such occurred, the defendant played no part in it since Mr. Jackson was the first one to see the mower after the accident. He simply reported what he saw and nothing more.

13-15. INSTRUCTIONS

Plaintiff will be deemed to have waived any and all objections that were not made in his last opportunity to make objections prior to the time the case was submitted. *Dunn v. St. Louis-San Francisco Railway Co.*, 370 F. 2d 681 (10 Cir. 1966.) Otherwise they become the law of

the case pursuant to Rule 51, F. R. C. P. Defendant cannot recall all objections made since they were made orally, but will stand on the correctness of the ruling that were made by the Court as reflected by the record.

16. JUDICIAL COMMENT

The only judicial comment the defendant can recall is one made when the Court sustained a defense objection concerning the condition of the blade brake that was never used by Jeff Morriss because he had no time to use it. First of all the defendant contends the comment was entirely appropriate. However the Court changed his ruling later on and permitted evidence on the subject thereby eliminating any possibility of prejudice to the plaintiff's position.

17. DIRECTING THE JURY TO ANSWER A DAMAGE INTERROGATORY

Rule 49(a) permits special verdicts, and the Kansas substantive law on comparative negligence, as construed by this Court in *Stueve v. American Honda Motor Co.*, 457 F. Supp. 740, requires them. Under Rule 49(a), the Court has the power to return an issue to a jury if a jury does not answer a question, and if the parties do not request it, they waive their right to trial by jury on the issue. Pursuant to Rule 49(b), when the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the Court may return the jury for further consideration of its answers and even permit changes and a verdict can be entered thereon or the Court may in his discretion, order a new trial. See

Bartholomew v. Universe Tank Ship, (S. D. N. Y. 1957), 168 F. Supp. 153. In *Turchio v. D/S A/S Den Norske Africa*, 509 F. 2d 101 (Ca. II 1974) the Court held that the trial court had the power to return a jury to answer an unanswered special question, but under the circumstances of that case granted a new trial because of the confusion preceding the end result.

An additional point exists in this case in that the unanswered question had no affect whatsoever upon the judgment that was ultimately returned. Had the question remained unanswered, the Court would have had power to enter judgment anyway, since an interrogatory on damages was irrelevant to a judgment for the defendant. In this circumstance, a trial court has been held to have authority to enter judgment even though the interrogatory was not answered. In *Black v. Riker-Marxson Corp.*, 401 F. Supp. 693 (S. D. N. Y. 1975), the Court said at page 696:

"[1] Plaintiffs cite no authority to support their argument that the failure of the jury to answer questions 2(a), 2(b) and 3 constitutes grounds for a new trial; actually the law is to the contrary. The failure by a jury to answer some of the questions in a special verdict does not vitiate an otherwise unanimous verdict where the unanimous answers to the verdict conclusively dispose of the case. *Skyway Aviation Corp. v. Minneapolis, Northfield & Southern Railway Co.*, 326 F. 2d 701 (8th Cir. 1964); *Kissel v. Westinghouse Electric Corp., Elevator Division*, 367 F. 2d 375 (1st Cir. 1966); *Pacific Indemnity Co. v. McDermott Brothers Co.*, 336 F. Supp. 963, 967 (M. D. Pa. 1971)."

Plaintiff's counsel might contend that an answer to such a special interrogatory is mandated by K. S. A. 60-258a. This Court has previously observed that K. S. A. 60-

258a has both procedural and substantive provisions. The substantive provisions are binding but the procedural provisions are not. *Greenwood v. McDonough Power Equipment, Inc.*, 437 F. Supp. 707, and cases cited therein; *Nagust v. Western Union Telegraph Co.*, 76 F.R.D. 631 (D.C. Kan. 1977); *Hanna v. Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965).

18. APPROACH OF JURORS

Defendant will stand by the correctness of this Court's Order filed April 30, 1980, and Local Rule 23 A. The rationale for the rule is adequately explained in *Silkwood v. Kerr-McGee Corp.*, No. CIV-0888 (W.D. Okl. 6/20/79) unpublished, which was referred to by this Court in the April 30, 1980, Order. Defendant adopts the rationale of the *Silkwood* opinion and all cases cited therein.

For all of the foregoing reasons, defendant submits that plaintiff's Motion for New Trial be denied in its entirety.

Respectfully submitted,

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(Certificate of Service Omitted)

(Caption Omitted)

ORDER DENYING PLAINTIFF'S MOTION
FOR NEW TRIAL

(Filed June 5, 1980)

This action comes before the Court upon plaintiff's motion for a new trial. The matters raised by the motion have all been the subject of previous rulings by this Court. Many of the matters have been ruled upon several times. The Court stands by its earlier rulings. The Court is convinced that the matter was fairly and thoroughly tried and that the jury's verdict was a just one, well-supported by the evidence.

The motion for a new trial will be denied. Plaintiff's time to appeal will begin to run with the filing of this Order.

IT IS SO ORDERED.

Dated this 2nd day of June, 1980, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

JAN 10 1983

ALEXANDER L. STEVAS
CLERK

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-958

MCDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child,
by his parents and natural guardians,
JOHN G. GREENWOOD and FRED A GREENWOOD;
JOHN G. GREENWOOD, individually;
and FRED A GREENWOOD, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that the jury foreman's refusal to answer a question posed on voir dire prejudiced Respondent's right to peremptory challenge?

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States
Court of Appeals for the Tenth Circuit

is reported at 687 F.2d 338 and is set out in the appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Respondent (Greenwood) is dissatisfied with Petitioner's (McDonough) entire statement of the case. McDonough has not stated the case objectively and in some instances has flatly misstated the facts.

On May 25, 1976, Jeff Morris, thirteen years of age, was mowing the Morris yard on a riding mower manufactured by McDonough, pursuant to his father's instructions. Jeff had previously operated the mower approximately thirty hours over a three to four year period.

On this particular day, Troy Greenwood,

Billy's older brother, was riding on the mower with Jeff. The Morrisises and Greenwoods were next-door neighbors. While operating the mower, Jeff watched the left front wheel to make certain that he was getting an even cut. Jeff was aware that Billy, two years of age, and several other children, were playing at and around a swingset in the back yard, approximately 25 feet from the area where he was mowing.

While Jeff was mowing the yard, Billy, undetected by Jeff, approached the mower to pick up a doll in the path of the mower. Immediately prior to the accident, Jeff, upon realizing that Billy was in the path of the mower, shouted "watch out." Fearing that he could not stop in time, Jeff turned the mower to the right to avoid hitting Billy. During the course of the turn, the left front tire of the mower went over Billy's left foot. Billy subsequently kicked at the mower with his right foot but both feet went under the mower where they

contacted the mower blade, resulting in the loss of both feet.

At the time of the accident, Freda Greenwood was in her home doing housework. Although she was aware that Troy and Billy were playing in the Morris yard, she was unaware that Jeff was mowing the yard until Troy notified her of the accident.

Following extensive discovery and pretrial, the case proceeded to trial on the basis of strict liability. The Greenwoods alleged that the mower was defective in that: the blade was below the deck of the mower; the blade bar, as manufactured, was not within McDonough's manufacturing tolerances thus causing the blade level to be below the deck, aggravating the injury to the left foot; the blade was improperly designed; the blade brake-clutch was defectively designed because it did not provide a deadman control for stopping, and because of its lack of durability.

The jury, in accordance with Kansas law, was allowed to compare the fault of McDonough, Jeff Morris, Ira Morris, and Freda Greenwood. See Kan.Stat.Ann. §60-258a (1976). The jury returned a verdict finding McDonough 0% at fault, Jeff Morris 20% at fault, Ira Morris 45% at fault, and Freda Greenwood 35% at fault. The jury assessed the damages at \$0.00. Upon being instructed by the trial court that, inasmuch as Billy had lost both feet he had definitely suffered some damages, the jury reconvened for further deliberations and found that Billy had been damaged in the amount of \$375,000.00. The district court thereafter entered judgment that Billy take nothing, that the action be dismissed on the merits, and that McDonough recover its costs.

Appeal was duly taken raising eight issues for review. In the Court of Appeals for the Tenth Circuit, the Greenwoods

contended inter alia the district court erred in denying their motion to approach the jurors and in denying leave to subpoena the jurors to give testimony at the hearing on their motion for a new trial. They also contended they were entitled to a new trial because their right to peremptory challenge was impaired.

The judgment in favor of McDonough was entered on April 25, 1980. On April 29, 1980, the Greenwoods filed a motion to approach the jurors contending that "plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions." Record, Vol. 2, at 325.

The Greenwoods' attorney, in his voir dire, had asked the prospective jurors:

Now, how many of you have yourself or any members of your immediate family, sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted

in any disability or prolonged pain or suffering, that is you or any members of your immediately family?

Record, Vol. 21, at 39. One juror answered affirmatively, and after additional questioning by Greenwoods' attorney as to his impartiality, was allowed to remain on the jury. Mr. Payton did not respond.

On April 30, 1980, the district court entered a memorandum and order denying the Greenwoods' motion to approach the jurors.

On May 1, 1980, the Greenwoods filed a second motion to approach the jurors which states:

Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had even been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Record, Vol. 2, at 345. On May 5, 1980, the district court entered an order granting, in part, the Greenwoods' second motion:

Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.

The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.

Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Record, vol. 2, at 348.

Counsel for both parties subsequently arranged for a conference call interview with juror Payton. During the course of the interview, which was not preserved as part of the record herein, juror Payton related that his son had received a broken leg as the result of an exploding tire. According to counsel for the Greenwoods, Payton related that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life," and that "all his children have been involved in accidents." Appellants' Brief at 7. Counsel for McDonough expressly adopted these facts (Appellee's Brief at 18) except as corrected by adding that Payton "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering.' As far as Mr. Payton is concerned he answered

counsel's question honestly, and correctly, by remaining silent." Appellee's Brief at 18.

Also on May 5, 1980, Greenwoods filed a Motion for New Trial on the grounds, inter alia, that the district court had erred in denying plaintiff's motions to approach the jurors, thus depriving plaintiff of the opportunity to present evidence of juror misconduct in support of the motion; Greenwoods requested oral argument and further requested leave of Court to subpoena jurors to give testimony at the hearing on the motion. On June 2, 1980, the district court denied the motion.

At oral argument in the Court of Appeals, counsel for the Greenwoods pointed out it would now serve no useful purpose to remand for an evidentiary hearing where juror Payton could be questioned inasmuch as the material facts revealing Payton's cavalier attitude toward injuries were not in dispute. But, the decision of the Court of Appeals

does not rest upon facts disputed or undisputed, developed subsequent to trial. The Tenth Circuit held Payton's refusal to answer the question posed on voir dire prejudiced the Greenwoods' right to peremptorily challenge as a matter of law because the information concealed was of sufficient cogency and significance to cause the Court to believe counsel was entitled to know of it. Further, the Court of Appeals held that the suppressed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury.

SUMMARY OF ARGUMENT

1. The Petition contains misstatements of fact and law. McDonough misstates the holding and import of the decision below.

2. There has not been a departure from the accepted and usual course of judicial proceedings. The decision below

expressly found probable bias of a juror resulting in prejudicial impairment of the right to peremptory challenge. Determination of probable bias by a juror as a matter of law proceeds on a case-by-case basis on the particular facts presented and necessarily calls for the exercise of good judgment by Courts of Appeal. The only real question posed by McDonough turns on the particular facts of this case and is of interest solely to the parties involved.

3. There is no conflict among the circuits concerning the legal principles to apply in determining probable bias of a juror with resulting prejudicial impairment of the right of peremptory challenge. The circuits apply the same legal principles to the particular facts of each case and decide each case on an ad hoc basis. The very nature of the problem precludes assertion of any hard and fast rule; absolute uniformity of result is neither achievable nor desirable because the result varies with the facts.

REASONS FOR DENYING THE WRIT -
ARGUMENT AND AUTHORITIES

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE JURY FOREMAN'S FAILURE TO ANSWER A QUESTION POSED ON VOIR DIRE PREJUDICED RESPONDENT'S RIGHT TO PEREMPTORY CHALLENGE.

1. Observations on misstatements in the Petition.

Knowing counsel for McDonough to be able lawyers, we can only assume that misstatements of fact and law contained in the Petition are not made with intent to mislead this Honorable Court, but rather are due to inadvertance and oversight. We feel constrained to point out examples of such inaccuracies before proceeding with argument on the issue.

McDonough states at page 4:

The trial judge granted leave to contact Mr. Payton and questioned him concerning the allegations.

The trial judge granted leave to contact

Mr. Payton but never questioned him concerning the verified statements of Mr. Greenwood, despite Greenwood's request for leave to subpoena the jurors to give testimony at the hearing on Greenwood's motion for new trial.

McDonough states at page 5:

Needless to say, counsel's versions of the information imparted by Mr. Payton differed significantly.

Only in this Court has the content of this conversation become such an issue. Greenwoods' quotation of the statements by Mr. Payton (Appellant's Brief at 6-7) were expressly adopted by McDonough in its brief in the Court of Appeals (Appellee's Brief at 18). More important, this is completely immaterial to the decision of the Court of Appeals, as anyone can see by reading it. Thus, McDonough's countless statements throughout the Petition to the effect that the Court of Appeals held that Payton's comments during the post-trial telephone conversation presented evidence of partiality, that the Court of Appeals granted

a new trial based on "plaintiff's counsel's report" of the interview or "unsupported allegations" or relied upon facts which "nowhere appear in the trial record" are simply erroneous.

Along this same tack, McDonough continually infers and implies that Greenwoods purposely failed to make a record and present the facts to the trial court. This is not true. Greenwoods were at first entirely precluded from interviewing jurors, then limited to a phone call with jury foreman Payton and limited to a very narrow area of inquiry, and then denied leave to subpoena jurors to a post-trial hearing. Greenwoods were thwarted in their attempts to make a post-trial record more extensive than that made. This was specifically pointed out to counsel for McDonough by one of the circuit judges at oral argument.

Greenwoods further abhor the implication advanced by McDonough that the decision of the Court of Appeals was influenced by

sympathy, or for that matter, anything other than the quest for justice.

Finally, a complete misstatement of facts appears in the first full paragraph beginning on page 13 and continuing on page 14 of the Petition. Greenwoods' attorney, Gene E. Schroer has demanded a retraction. The only true statement in the entire paragraph is that trial counsel for the Greenwoods, Mr. Schroer, had anticipated that Payton would be a good juror for the plaintiff since he was a meatcutter from Emporia, Kansas, and perhaps might be aware counsel for plaintiff had represented a meatcutter from St. Joseph, Missouri. The statements contained in the balance of McDonough's paragraph are categorically and emphatically denied. Greenwoods request the paragraph be stricken as irrelevant, immaterial, and scandalous, pursuant to Supreme Court Rule 34.6.

2. The Court of Appeals has not so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This point can be disposed of rather summarily. McDonough complains about the result based, in part, upon a misconstruing of the record and a misreading of the opinion of the Court of Appeals.

When the motion for new trial was overruled by the trial court, it had before it evidence by way of affidavit that juror Payton had failed to respond truthfully and accurately to voir dire questioning (R. Vol. II, at 325 and 345). When the Court of Appeals decided this case, it had before it the entire record which included these same affidavits, a transcript of the voir dire and it was admitted that Payton's son had indeed received a broken leg as the result of an exploding tire rim, and had related that "it did not make any difference whether his son had been in an accident," "that

"having accidents are a part of life,"
and "all his children had been involved in
accidents."

Irrespective of and without relying
on these statements, the Court of Appeals
held juror Payton's failure to answer the
question posed on voir dire prejudiced the
Greenwoods' right to peremptory challenge
necessitating a new trial where, following
established precedent, the unrevealed infor-
mation was of sufficient cogency and sig-
nificance that Greenwoods' counsel was
entitled to know of it in deciding how to
use his peremptory challenges. (Appendix
to Petition at A-9). The Court of Appeals
further held the unrevealed information
indicated probable bias of juror Payton
because it revealed a particularly narrow
concept of what constitutes serious injury.
(Appendix to Petition at A-10). McDonough's
assertions to the contrary fly in the face
of the Court's opinion.

McDonough cites in the opening of the Petition, Michelin Tire Corp. v. Fallaw, 679 F.2d 880 (4th Cir. 1981, unpublished), cert. denied, 103 S.Ct. 215 (Oct. 12, 1982), stated to be the "mirror image" of this case. Fallaw is said to be cited "to illustrate the potential for abuse" (Petition at 9). McDonough was kind enough to provide us copies of everything McDonough had regarding Fallaw but did not have and could not provide a copy of the unpublished decision. Thus, we are unsure of the legal basis for the decision of the Fourth Circuit and are advised of the facts only as disclosed by the Petition and Brief of Respondent in Fallaw. It would serve no useful purpose to contrast the facts in Fallaw with those in the present case - suffice to say they are different. Apparently both the trial court and the Fourth Circuit in Fallaw found the nondisclosure was not deliberate, and could not find probable bias or prejudice as a matter of law.

Apparently McDonough is upset with the flexible standard applied by the circuits when it becomes necessary to determine the actual or probable bias of a juror who has concealed information on voir dire. McDonough evidently believes this Court must lay down a hard and fast rule to curb the perceived abuse of discretion by circuit judges. The problem of juror bias itself precludes neat circumscription. As Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145-46, 81 L.Ed. 78, 57 S.Ct. 177 (1936), rehearing denied, 299 U.S. 624 (1937):

Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

Similarly, in Crawford v. United States, 212 U.S. 183, 196, 53 L.Ed. 465, 29 S.Ct. 260 (1909), this Court stated:

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

And in Peters v. Kiff, 407 U.S. 493, 504, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972), the joint opinion of Justice Marshall, joined by Justice Douglas and Justice Stewart, stated: "It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce."

There has been no departure from the accepted and usual course of judicial proceedings. There has been no arbitrary indulgence outside the boundaries of accepted principles of appellate review. Dozens of cases handed down every day inescapably rest on matters involving judicial judgment, e.g. when a verdict is reversed as excessive

or inadequate because it "shocks the conscience" of the court, when a verdict is found to be against the weight of the evidence, etc. In such cases involving matters of judgment and in this case involving juror misconduct, this Court cannot proceed on a case-by-case basis to determine whether each particular final judicial pronouncement correctly or incorrectly finds probable bias of a juror. This Court has long admonished the Bar that it is ill-equipped to play such a role: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

3. There is no conflict among the circuits.

A canvassing of cases among the circuits reveals absolutely no conflict. Rather, each case turns on the particular facts presented and is decided on the same standard and legal principles. Only the verbal formu-

lation of the standard varies in determining the probable bias of a juror.

Thus, all circuits appear in agreement that a showing of juror bias is the touchstone to determine whether to grant a new trial. [Appendix to Petition at A-8 and A-9; Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964); McCoy v. Goldston, 652 F.2d 654, (6th Cir. 1981); Vezina v. Theriot Marine Service, 610 F.2d 251 (5th Cir. 1980)].

All circuits appear to follow this Court's pronouncement that "the bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." United States v. Wood, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed.78 (1936).

The circuits then apply the above principles to the particular facts of each case, and in so doing arrive at various verbal formulas, all with essentially the same meaning, to guide district courts. For example, the Tenth Circuit states it is

enough to show probable bias and prejudice if the suppressed information was of "sufficient cogency and significance" that counsel was entitled to know of it (Appendix to Petition at A-8 and A-9; Photostat, supra, 338 F.2d at 787). The Sixth Circuit states it is enough ". . . if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome." McCoy, supra, 652 F.2d at 659 (citing, inter alia, Photostat, supra). The First Circuit states there must be ". . . a showing of significant facts from which prejudice can be inferred" Kissell v. Westinghouse Elec. Corp., Elev. Div., 367 F.2d 375, 376, (1st Cir. 1976). Also see United States v. Bynum, 634 F.2d 768 (4th Cir. 1980); Government of Virgin Islands v. Bodle, 427 F.2d 532 (3rd Cir., 1970); Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968); United States v. Allsup, 566 F.2d 68 (9th Cir. 1977).

Petitioner cites Vezina v. Theriot Marine Service, Inc., 554 F.2d 654, after remand,

610 F.2d 251 (5th Cir. 1980); Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981); McCoy v. Goldstein (sic), 652 F.2d 654 (6th Cir. 1981); Christian v. Hertz Corp., 313 F.2d 174 (7th Cir. 1963); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979); and Johnson v. Hill, 274 F.2d 110 (8th Cir. 1960) to support its claim that there is a conflict among the circuits concerning the standard for granting a new trial based on juror misconduct during voir dire.

A reading of the cases cited reveals no conflict. Vezina, supra, 554 F.2d at 656 simply states there is no "hard and fast rule" and each case "must be decided on an ad hoc basis." Martinez, supra, 658 F.2d at 375 turns on a finding of no concealment of information during voir dire. McCoy supra, quoted above, supports Greenwood's position herein. Christian, supra, without discussion found no abuse of discretion in the trial court's denial of defendant's motion for new trial on ground that one juror failed to reveal on voir dire an earlier

accident she had settled for \$100.00.

Hathorn, supra, has nothing to do with failure to answer a question posed on voir dire but did reverse for a new trial after a juror during trial volunteered to the court that he had built up a prejudice against an attorney. Johnson, supra, involved waiver of the right to challenge a juror who gave an incorrect response on voir dire since the complaining party knew the response was incorrect when given and failed to object.

McDonough's claim of disagreement among the circuits is thus unsound.

Greenwoods would finally point out that the result reached here is consistent with the rule prevailing in the state where the trial court sat; the Kansas Supreme Court has held in Kaminsky v. Kansas City Public Service Co., 175 Kan. 137, 140, 259 P.2d 207, 209 (1953):

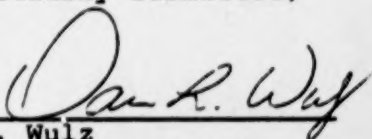
When a prospective juror, on voir dire examination gives a false or deceptive answer to a question pertaining to his qualifications with the result that counsel is deprived of further opportunity to determine

whether the juror is impartial, and the juror is accepted, a party deceived thereby is entitled to a new trial even if the juror's possible prejudice is not shown to have caused an unjust verdict.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that the Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,



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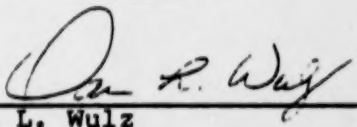
Date:

DECEMBER 31, 1982

CERTIFICATE OF SERVICE

I, Dan L. Wulz, in compliance with Rule

28.3 and 28.5 of this Court, hereby certify that all parties required to be served have been served by my causing hand delivery of three copies of the above and foregoing Brief of Respondents in Opposition at the office of counsel for petitioner: Donald Patterson, 520 First National Bank Building, Topeka, Kansas 66603, on the 31 day of December, 1982.



Dan L. Wulz

No. 82-958

Office-Supreme Court, U.S.
FILED

JUL 29 1982

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1982

—○—
McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents
and natural guardians, JOHN G. GREENWOOD and
FREDA GREENWOOD, JOHN G. GREENWOOD, indi-
vidually; and FREDA GREENWOOD, individually,

Respondents.

—○—
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

—○—
PETITIONER'S BRIEF ON THE MERITS

—○—
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals deprived Petitioner of its Constitutional right to a trial by jury by vacating the District Court's judgment without any showing of error or prejudice.

2. Whether the Court of Appeals applied an erroneous standard of law to the facts alleged in plaintiff's appeal brief, by holding that a new trial is required whenever counsel does not receive information which might be material to the exercise of peremptory challenges.

3. Whether the Petitioner is entitled to a judgment in accordance with the jury's verdict under the correct standard of law for any or all of the following reasons:

(a) The facts presented by plaintiff do not establish a prima facie case of juror misconduct;

(b) The inference of prejudice suggested by plaintiff was contradicted by all evidence in the record; and

(c) Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the District Court.

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(a) The facts presented by plaintiff do not establish a prima facie case of juror misconduct;	
(b) The inference of prejudice suggested by plaintiff was contradicted by all evidence in the record; and	

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No. 82-958

In The
Supreme Court of the United States
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McDONOUGH POWER EQUIPMENT, INC.,
Petitioner,
vs.

BILLY G. GREENWOOD, a minor child, by his parents
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FREDA GREENWOOD, JOHN G. GREENWOOD, indi-
vidually; and FREDA GREENWOOD, individually,
Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the U. S. Court of Appeals is reproduced in the appendix to the Petition for Certiorari at A-1. The opinion is reported at 687 F.2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix to the Petition for Certiorari at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 3, 1982. A timely petition for rehearing was filed on September 14, 1982. The petition for rehearing was denied on October 4, 1982. The Petition for Writ of Certiorari was filed within sixty (60) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1) (1976). The Petition for Certiorari was granted on June 20, 1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES THE CASE INVOLVES

1. The Seventh Amendment to the United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. 28 U. S. C. Section 1870

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

3. 28 U. S. C. Section 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. F. R. C. P. 47 Jurors

(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper. * * *

5. F. R. C. P. 61 Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

6. F. R. C. P. 1 Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

STATEMENT OF THE CASE

This is a personal injury products liability action involving an allegedly defective riding lawnmower. The three year old plaintiff was injured while playing with other children in a neighbor's yard, without parental supervision. The neighbor's thirteen year old son was operating a riding lawnmower manufactured by defendant McDonough Power Equipment Company, Inc. at the time of the accident, likewise without parental supervision. Plaintiff's nine year old brother was seated on the operator's lap at the time of the accident.

Subject matter jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. Section 1332. The case was tried in the U. S. District Court for the District of Kansas, sitting at Topeka, between April 4 and April 25, 1980. The jury returned a special verdict in accordance with the substantive law of the State of Kansas, where the accident occurred. The jury found no liability for the defendant manufacturer. The jury also found plaintiff's damages in the amount of \$375,000.00. (Appendix pp. 65, 66).

In accordance with the special verdict, the Court entered judgment in favor of the defendant manufacturer. Plaintiff filed a timely motion for new trial, alleging eighteen grounds. The eighteenth ground alleged involved the Court's refusal to permit interrogation of the jurors by plaintiff's counsel, who sought to obtain evidence of juror misconduct. The remaining grounds involved issues that had previously been ruled upon by the Court. Plaintiff's motion for a new trial was ultimately denied, and plaintiff appealed. (Appendix pp. 90-93, 106).

The U. S. Court of Appeals for the Tenth Circuit ordered a new trial, based upon the alleged misconduct of juror Ronald Payton. Payton allegedly failed to reveal significant information requested by plaintiff's counsel during voir dire. Defendant denied that Payton had failed to reveal significant information, and further denied that plaintiff had made any showing to the Court that Payton or any other juror was biased. The Court of Appeals held that plaintiff's allegations were sufficient to require a new trial.

The trial judge never held that juror Payton had concealed significant information, or that he was biased or prejudiced. (Appendix pp. 72-85, 89-90, 106). The Court of Appeals did not hold that the trial judge abused his discretion in denying the motion for a new trial. The Court of Appeals made a *de novo* determination on the question of juror misconduct, based on allegations that had never been substantiated at the trial level. The Court of Appeals held that comments made by juror Payton during a discussion with counsel subsequent to trial supported the contention of misconduct. The contents of this conversation were never reported to the trial judge, and were never made a part of the District Court record. Plaintiff's counsel had been granted permission to approach juror Payton for the purpose of obtaining support for his motion for a new trial. Because the results of the interview were not reported to the trial judge, that information had no influence on the decision to deny the motion.

The specific act of misconduct alleged was the failure of juror Payton to respond to a question asked by plaintiff's counsel:

Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family? (Appendix p. 19).

In support of a post trial motion to approach juror Payton, plaintiff's father submitted an affidavit alleging that juror Payton's son had suffered a broken leg caused by the accidental separation of a truck wheel. (Appendix pp. 87-88). In response to this motion defense counsel requested that any juror interview take place in the presence of all counsel and a Judge or Magistrate, and that a permanent record be made of the interview. (Appendix p. 71). The trial judge granted leave to contact Mr. Payton and question him concerning the allegations. Unfortunately the trial judge did not require that a permanent record of juror Payton's comments be made. (Appendix pp. 89-90). The trial judge described his understanding of the issue to be resolved in the following terms:

Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side. (Appendix pp. 89-90).

Persission to interview juror Payton was granted on May 5, 1980. Plaintiff's motion for new trial was also filed on that day. (Appendix pp. 90-93). Payton was interviewed by telephone the next day. The results of the interview were not reported to the trial judge.

During the course of jury selection counsel for both parties inquired extensively about potential prejudices. Counsel for defendant inquired about the jurors' ability to put aside any prejudices they might have in favor of a small child who had suffered a severe injury. (Appendix pp. 49-62). Counsel for plaintiff focused on prejudices against plaintiffs in general, and against the awarding of large monetary sums for personal injuries. (Appendix pp. 16-48).

Counsel for plaintiff specifically inquired into abnormal or unusual attitudes toward pain and suffering. Marguerite Finnigan was questioned at some length by plaintiff's counsel about her history of employment as a nurse, and the effect her exposure to pain and suffering might have on her objectivity as a juror. (Appendix pp. 35-36). At the time plaintiff's counsel inquired of Mrs. Finnigan about her attitude toward pain and suffering, the only information in the record which would put counsel on notice of a need to inquire about her attitude was her employment.

Plaintiff's counsel was also aware that Ronald Payton was a butcher employed by Iowa Beef Processors (a slaughter house). (Appendix p. 11). The questions directed to Mr. Finnigan concerning her attitude toward pain and suffering were not asked of juror Payton. There is no explanation in the record why plaintiff's counsel would inquire about a nurse's attitude toward pain and

suffering yet forego a similar inquiry of a slaughter house employee, other than the fact that "trial counsel for the Greenwoods, Mr. Schroer, had anticipated that Payton would be a good juror for the plaintiff since he was a meat cutter from Emporia, Kansas and perhaps might be aware counsel for plaintiff had represented a meat cutter from St. Joseph, Missouri". (See Brief of Respondents in Opposition, pg. 16).

At least one other member of the jury panel failed to perceive the intent of the question which Payton failed to answer. Mrs. Finnigan's husband had been involved in a serious product related injury. This fact was revealed during voir dire examination by defense counsel:

Mr. Patterson. Now, I notice that a number of you, either yourselves or someone in your immediate family pursue occupations that involve machinery either on a production line or in some other capacity. Are there any among you who either yourself, your immediate family, close friend or a neighbor have ever been injured on any kind of a machine whether it is at home or whether it is at work, at the factory or whatever? If so, would you please raise your hand.

(Reporter's Note: Response.)

Mr. Patterson. Mrs. Finnigan?

Mrs. Finnigan: When my husband was working one time he was cleaning out a machine, and put his hand in it to clean it out, and somebody turned the machine on and it stripped the back of his hand off.

Mr. Patterson. Now how long ago did that happen?

Mrs. Finnigan: Oh, that's been a long time too. About 15 years.

Mr. Patterson: As a result of that experience was there any kind of a claim made by your husband against the manufacturer of the machine?

Mrs. Finnigan: Oh, no. No, it wasn't. It didn't have anything to do with the machine, it was a human error of somebody else. (Appendix, pp. 53-54).

Juror Cook also failed to reveal an injury to his son until defense counsel inquired generally about injuries to family members. (Appendix p. 54). Both Cook and Finnigan remained on the jury. (Appendix p. 64). None of the veniremen who were subjects of peremptory challenge by Respondents revealed injuries to family members. Peremptory challenges were used in the following sequence:

P1: David S. Kerns

D1: Connie S. Gladhill

P2: Harvey A. Barnhill

D2: Ethelyn L. Roose

P3: Joy E. Wendt

D3: Steve L. Hillard

(Appendix p. 64).

Mr. Kerns was employed by a tool and die company. He was questioned concerning his possible sympathy for manufacturers. (Appendix pp. 41-42). Mr. Barnhill was questioned about his wife's employment with an insurance company. (Appendix pp. 21-22). Mrs. Wendt was the personal secretary of a bank president. Her husband was a telephone company engineer. (Appendix p. 28).

During the post-trial interview Payton confirmed that his son had suffered a broken leg under the circumstances alleged, but explained that no disability or prolonged pain had resulted. The summertime injury did not prevent young Payton from playing high school football a few months later. Plaintiff's counsel made no arrangements

either to tape the interview or to have a stenographic transcript made. When the results of the interview were ultimately described in appellate briefs, each counsel relied upon his own telephone notes and personal recollection of the interview.

Counsel for defendant's recollection of the interview was that Payton confirmed the truthfulness and completeness of his answers during voir dire. Contemporaneous notes of the conversation made by defense counsel indicate that juror Payton affirmed repeatedly that his son's injury did not influence his attitude toward the merits of the case. The comments quoted by plaintiff's counsel, to the effect that the son's injuries did not "make any difference", were interpreted by defense counsel to indicate that the son's injury made no difference to juror Payton's behavior as a juror, not that he had been indifferent to his son's pain and suffering at the time the injury occurred.

Two of the three members of the Court of Appeals panel considered plaintiff's counsel's report of the interview sufficient grounds to order a new trial of the entire case. The majority members of the panel held that juror Payton's failure to reveal the fact of his son's injury, although concededly innocent, deprived plaintiff's counsel of information that might have influenced the manner in which voir dire was conducted. The majority members did not hold that the post-trial revelations by juror Payton were evidence that he was in fact biased. It was instead held that the post-trial revelations were sufficiently material to induce a prudent plaintiff's counsel to inquire further into the subject of juror Payton's attitude toward pain and suffering, and that such further inquiry might have revealed evidence of bias.

The majority opinion of the Court of Appeals offered no explanation for the failure of plaintiff's counsel to make the same inquiry of Mr. Payton that he had made of Mrs. Finnigan. No explanation was offered for the finding of "materiality", despite the obvious inference to be drawn from Payton's employment history.

The third member of the panel dissented, arguing that the most plaintiff was entitled to was a hearing before the district court judge for the purpose of making factual determinations on the allegations of misconduct. This panel member also voted to grant defendant's motion for rehearing and submit the appeal to the Tenth Circuit *en banc*.

SUMMARY OF ARGUMENT

This is an appeal from the denial of a new trial in a civil case. Two of the three members of the appeals panel voted to order a new trial for the very narrow and specific reason that plaintiff's statutory right to exercise peremptory challenges had been impaired. The Court of Appeals did not find that plaintiff was deprived of a fair trial by an impartial jury. There was no finding that any juror was in fact biased. Every juror was found to have acted in good faith. A new trial was ordered because it was felt that plaintiff's counsel had been deprived of the ability to exercise his peremptory challenges intelligently, through the innocent failure of a juror to reveal pertinent information during voir dire.

Petitioner was entitled to a trial by jury under the Seventh Amendment to the United States Constitution.

The trial court was required to enter judgment in accordance with the jury's verdict in the absence of a showing of actual prejudice resulting in impairment of a substantial right held by plaintiff, under F.R.C.P. 61. The procedures followed by the District Court Judge were proper and reasonable under F.R.C.P. 47. The plaintiff's motion for a new trial was denied without an abuse of discretion, since no evidence was presented at the District Court level of the impairment of any substantial right of the plaintiff.

The petitioner was deprived of the benefit of the jury's verdict without due process, because the Court of Appeals applied an irrebuttable presumption of misconduct and resulting prejudice. The Court of Appeals refused to consider any evidence in the record in making the determination of misconduct and prejudice. No rational principle of decision was set out under which a litigant could predict the finality of a verdict. No rational rule of law was set out which would permit Court or counsel to avoid reversible error in the future. The Court of Appeals gave no suggestions for a procedure by which counsel could obtain in the future sufficient information to permit the "intelligent" exercise of peremptory challenges.

The Tenth Circuit Court of Appeals elevated the statutory right to peremptory challenges provided in 28 U. S. C. Section 1870 to constitutional significance. The Court of Appeals ignored the petitioner's right to a jury trial, and the obligation to ignore harmless error set out in 28 U. S. C. Section 1870 and F.R.C.P. 61. The Court of Appeals ignored the requirement of F.R.C.P. Section 1 that the Rules of Civil Procedure be interpreted to se-

cure the just, speedy and inexpensive determination of civil actions. The Court of Appeals ignored all accepted principles of appellate review in making a *de novo* determination of juror misconduct based upon allegations of fact which had never been presented at the District Court level, and which were not substantiated by anything in the appellate record.

The correct procedure to be followed in a case such as this is to require the complaining party to present admissible evidence that juror misconduct has occurred. Without evidence of juror misconduct, the verdict should stand. The trial court, not the Court of Appeals, should make factual findings in the event that evidence of misconduct is forthcoming. Misconduct should not be presumed, but should be found only when the juror has engaged in dishonesty or acted in bad faith. A finding of dishonesty or bad faith should not automatically require a new trial. If the juror's conduct indicates a prejudice in favor of the complaining party, a new trial should be denied. If the juror's misconduct indicates a biased attitude on an issue which is not submitted for decision, the verdict should stand. If the information revealed by the juror during voir dire is of equal cogency and materiality as the information withheld, the trial court should be entitled to find harmless error. Upon a finding by the trial court that a party has been deprived of information not otherwise known to counsel by the dishonesty or bad faith of a juror, and a finding that the information withheld is indicative of bias against the complaining party on an issue which was determined by the jury, a new trial should be ordered.

Plaintiff's counsel was not in fact deprived of the exercise of his peremptory challenges. All jurors gave honest answers to the questions asked of them. No human being can give more. A standard of law which imposes upon panel members an obligation to read the minds of counsel or to anticipate the issues to be tried is unworkable in fact and unfair both to jurors and to the parties. Jurors are real persons drawn from a cross-section of the community, not abstractions. Honesty and integrity on their part should suffice.

The interrogation of juror Payton subsequent to trial did not reveal any indication that counsel was deprived of the ability to exercise peremptory challenges intelligently. The post-trial "revelations" added nothing to the information already available to counsel. Counsel was already put on notice that juror Payton may have had a different attitude toward pain and suffering than is usual, because Payton had already revealed that he worked as a butcher in a slaughter house. The information revealed by the juror was therefore sufficient to put counsel on notice that this area should be inquired into. Any additional inference to be drawn from the fact that juror Payton's son had once suffered a broken leg is insignificant by comparison.

If the additional information had in fact been significant, it would have been reported to the District Court. It was not. If any juror's attitude toward the seriousness of personal injuries was unusual, it could only be reflected in a damage award, not in a finding of no liability. Because the jury unanimously found no liability, any contention that a juror had an unfavorable attitude on the issue

of damages would constitute a harmless error even if proven.

ARGUMENT AND AUTHORITIES

- I. Whether the Court of Appeals deprived Petitioner of its Constitutional right to a trial by jury by vacating the District Court's judgment without any showing of error or prejudice.**

The Seventh Amendment to the United States Constitution guarantees civil litigants the right to a trial by jury. Plaintiff's claims against petitioner were based upon the common law, and the relief sought was monetary damages rather than any equitable relief. The constitutional right to trial by jury therefore applies to the present case.

The right to a trial by jury is more than the right to have a jury sit as spectators in the courtroom. That right has no meaning unless the jury's verdict is embodied in the Court's judgment on the merits. The right to a trial by jury is the right to a judgment in accordance with the jury's verdict, or it is nothing. The District Court correctly entered judgment in accordance with the jury's verdict exonerating petitioner from liability. The U. S. Court of Appeals for the Tenth Circuit deprived petitioner of the benefit of the jury's verdict by vacating the District Court's judgment and ordering a new trial. Because the order of the Court of Appeals was contrary to law, and without any rational basis, this petitioner has been deprived of its rights under the Seventh Amendment to the United States Constitution.

In denying petitioner the benefit of the jury's verdict, the Court of Appeals created an irrational and fictitious "right" on behalf of plaintiff, and found that the newly created "right" had been violated. The Court of Appeals held that counsel for civil litigants are entitled to an unspecified level of knowledge concerning prospective jurors, in excess of the information that can in fact be elicited during voir dire examination. The Court of Appeals held that the statutory right of peremptory challenge afforded by 28 U. S. C. Section 1870 implies a right to exercise challenges "intelligently". The implied right to exercise challenges "intelligently" carries with it the implied right to know all information about members of the jury panel which would be "material" to the exercise of challenges, according to the Court of Appeals. "Materiality" is not to be judged in relation to the exercise of peremptory challenges, but in relation to the conduct of voir dire examination. In the present case the Court of Appeals has held that a new trial is required where a juror innocently and in good faith withholds information which might have influenced counsel's conduct of the voir dire examination, whether that information would have resulted in a different use of peremptory challenges or not.

The implication of an abstract "right to know" during jury selection is constitutionally impermissible. There is no constitutional right to the exercise of peremptory challenges, intelligent or otherwise. *Stilson v. United States*, 250 U.S. 583, 586, 63 L.Ed. 1154, 50 S.Ct. 28 (1919). Neither the United States Code nor the Federal Rules of Civil Procedure guarantee to counsel the right to conduct voir dire examination. The trial judge may reserve voir dire examination solely to himself under F.R.C.P.

47(a). All that litigants are guaranteed is the right to exercise three (3) peremptory challenges under 28 U. S. C. Section 1870.

This Court determined nearly five decades ago that the constitutional right to a jury trial in civil actions is subject to reasonable modifications by Congress and the Courts, for the purpose of promoting juror impartiality. See *United States v. Wood*, 299 U.S. 123, 81 L. Ed. 78, 57 S. Ct. 177 (1936); see also *Galloway v. United States*, 319 U.S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077, (1942) and *Frazier v. U. S.*, 375 U.S. 497, 93 L. Ed. 187, 69 S. Ct. 201 (1948). But interference with the role of the jury is strongly disfavored:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. (*Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1934) at 293 U.S. 486).

Congress has specified the means by which impartial juries are to be selected, by enacting 28 U. S. C. Section 1866 and 28 U. S. C. Section 1870. These statutory provisions and the Federal Rules of Civil Procedure relating to the selection of juries are reasonable and proper means to achieve the result guaranteed by the Seventh Amendment.

The rule espoused by the Tenth Circuit Court of Appeals in the present case, in contrast to the procedural rules for jury selection, is a substantive principle unrelated to procedure. A rule which permits the avoidance of a jury verdict upon the occurrence of some specified event, which cannot be avoided by the parties, the Court, or any

other participant in the trial, is not a rule of procedure. An absolute right to know the thoughts of jurors, in contrast to a right to inquire of them concerning their beliefs and attitudes, is an arbitrary impairment of the right to trial by jury. The rule can be applied only in the context of a motion for a new trial, and is meaningless as a proposed tool for jury selection.

The Court of Appeals acknowledged that Juror Payton's failure to reveal the fact of his son's injury in response to the question stated by plaintiff's counsel was in good faith and unintentional:

We accept as true that Mr. Payton did not intentionally conceal the information and held a good-faith belief that his son's injury was not a serious one resulting in disability or prolonged pain and suffering. Good faith, however, is irrelevant to our inquiry. (Petition for Certiorari at A-10).

Thus there is no showing of juror misconduct. There was no finding nor any contention that defense counsel or the trial judge were aware of the information in question, and failed to reveal it to plaintiff's counsel. There was no finding that any other participant in the trial failed to conduct himself properly. The Tenth Circuit has therefore found prejudice without error, and a wrong without a wrongdoer.

The Tenth Circuit Opinion in this case employed a presumption that a juror's failure to reveal information of a certain sort is proof of bias, and of prejudice to the complaining party. It is difficult to perceive how this presumption amounts to anything distinguishable from a finding that the juror would have been challengeable for cause, if the omitted information had been known during the jury

selection process. If the omitted information is not sufficient to warrant the granting of a challenge for cause, there is no basis for a presumption of bias or prejudice. On the basis of simple logic it is difficult to perceive how an unintentional failure to reveal information can be indicative of bias against one party rather than the other, or can imply any likelihood that the juror's unexpressed attitude will influence jury deliberations. The opinion of the Court of Appeals enunciated no purpose to be served by presuming bias and prejudice, rather than requiring proof of those circumstances. This presumption certainly cannot withstand the strict scrutiny required by *Dimick v. Schiedt*, *supra*.

The rule of decision adopted by the Court of Appeals not only fails to meet the strict scrutiny test required by *Dimick*, it also fails to display a rational basis. A presumption of bias only makes sense in the context of challenges for cause. Such a presumption is a self-contradiction when applied to a claimed deprivation of a peremptory challenge.

Two conditions must be met in order for a litigant's right to exercise peremptory challenges to be impaired by a juror's material omission of fact: (1) the unrevealed information must be indicative of an unfavorable attitude toward the position of the complaining party; and (2) the unrevealed information must not be so indicative of bias that a challenge for cause would have been granted, if the information had been known. Because any information which is of sufficient significance to warrant an irrebuttable presumption of bias and prejudice would also be sufficient to support a challenge for cause, it would appear that there is no circumstance under which the rule adopted

by the Tenth Circuit can be applied. Where the right of *peremptory* challenge is involved, implied bias and prejudice have no place.

Even if the presumption adopted by the Tenth Circuit were allowable, due process would require an evidentiary hearing on the issue of materiality. The constitutionally mandated procedure for the determination of questions relating to alleged juror misconduct is a hearing before the trial judge. See *Smith v. Phillips*, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982); *Remmer v. United States*, 347 U.S. 227, 98 L. Ed. 654, 75 S. Ct. 450 (1954); *Dennis v. United States*, 339 U.S. 116, 94 L. Ed. 734, 70 S. Ct. 519 (1950). It is the District Courts, not the Courts of Appeal, which are equipped to enable determinations of fact:

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. *Hormel v. Helvering*, 312 U.S. 552, 85 L. Ed. 1037, 61 S. Ct. 719 (1941), 312 U.S. at 556.

The majority members of the Court of Appeals panel refused to consider evidence of the information available to counsel in the absence of the allegedly suppressed information, or to consider the manner in which counsel responded to information of similar import during the jury selection process. The dissenting justice's suggestion that

the case be remanded for an evidentiary hearing was also rejected. This attitude deprived petitioner of the right to rebut the allegations made by plaintiff's counsel, and thereby deprived petitioner of the most rudimentary due process rights. The refusal of the Court of Appeals to consider any evidence of materiality in fact, versus presumed materiality, resulted in an unqualifiedly arbitrary decision.

The Court of Appeals made its finding that plaintiff's counsel was deprived of "material" information *in vacuo*. According to the majority opinion of the Court of Appeals, the presence or absence of good faith on the part of the juror whose conduct is questioned is irrelevant. According to the majority opinion of the Court of Appeals, the manner in which plaintiff's counsel exercised peremptory challenges is irrelevant. The relative significance and weight of the unrevealed information, compared to that which was revealed, is also irrelevant. Any inquiry into the fairness of the trial afforded to plaintiff also is apparently irrelevant. The failure of plaintiff's counsel to inform the trial court of the facts on the basis of which the Court of Appeals felt compelled to grant a new trial is also irrelevant. The presence or absence of any inference that the presumptive bias of juror Payton in any way influenced the verdict is also irrelevant. The question Petitioner must therefore ask is whether any fact is relevant to the decision of the Court of Appeals in this case?

The only circumstance appearing in the record which is stated to have had any bearing on the decision of the Court of Appeals is the failure of the trial judge to grant defendant's motion for a directed verdict:

We emphasize that plaintiff's cause of action is not a groundless one. The District Court found plaintiff's

evidence sufficiently substantial to justify submission of their theory of liability to the jury. We are therefore satisfied that our remand for a new trial is not an exercise in futility. (Petition for Certiorari at page A-10).

It would therefore appear that a defendant in the Tenth Circuit has no right to a trial by a jury unless the plaintiff's evidence is so insubstantial that a directed verdict is in order. By this reasoning, a defendant is entitled to a trial by jury only when a plaintiff is not. Where a directed verdict against the plaintiff is proper, the defendant certainly has no need of a jury trial. According to the Tenth Circuit, a plaintiff has a right to a new trial whenever he has a right to any trial. A defendant is never entitled to the benefit of a jury verdict by this reasoning.

II. Whether the Court of Appeals applied an erroneous standard of law to the facts alleged in plaintiff's appeal brief, by holding that a new trial is required whenever counsel does not receive information which might be material to the exercise of peremptory challenges.

Even if the rule of presumptive bias and prejudice followed by the Tenth Circuit Court of Appeals were constitutionally permissible, it would not be good law. Other Circuit Courts of Appeal have historically followed a more reasonable formula for reviewing allegations of jury misconduct during voir dire examination. The rule followed by the Tenth Circuit is especially objectionable because it requires no showing of prejudice to any substantial right of the complaining party, contrary to 28 U.S.C. Section 2111 and F.R.C.P. 61.

The rule applied by the Tenth Circuit focuses upon the nature of the information which counsel claims should have been revealed. If that information would have been

revealed by an "ordinary juror", and if the typical counsel representing a litigant similar to the complaining party would take that information into account in conducting voir dire examination, the Tenth Circuit will order a new trial. No other Circuit Court of Appeals adheres to such a rule. Although there appears to be no uniformity among the rules applied in the various Circuits, it would appear that a new trial is required in the present case only under the rule followed in the Tenth Circuit.

Some of the earlier cases involving the failure of jurors to reveal information during voir dire showed good sense and great practicality. For example, in *Orenberg v. Thecker*, 143 F. 2d 375 (D. C. Cir. 1944), an unsuccessful plaintiff complained that only one juror revealed past personal injuries during voir dire, when in fact three jurors should have answered. The analysis of the issue by Justice Miller of the D. C. Circuit is worthy of quotation in full:

The second specification is that some jurors gave false answers or concealed material information by silence when questioned on the voir dire, concerning claims for personal injuries previously suffered by them. The questions propounded to the panel—and in response to which two jurors remained silent—were: (1) 'Have any of you even been plaintiffs in a case involving personal injuries in an automobile accident, or any other kind of an accident? Have you ever presented a claim against anyone for personal injuries, whether arising out of an automobile accident, or an accident in a store, apartment house or hotel?' and (2) 'Is there anyone else who has had a claim of any kind involving personal injuries?' It can be too easily assumed that laymen, called from ways of life far removed from the courtroom, will understand words and terms of art customarily used by lawyers and judges.

As a matter of fact, many such words are not well understood by lawyers and judges themselves. It would be a violent assumption that such laymen will be alert to give considered answers to questions containing several such words or terms, or that failure to respond constitutes concealment or a false answer. For example, even to lawyers and judges, such words as 'claim' and 'presented' have varied meanings. Some laymen, who have had no courtroom experience, do not know the meaning of 'plaintiffs,' 'personal injuries' and other words which were used in the questions propounded by counsel for appellants. Within the last year this court had occasion to decide a dispute between able counsel as to the meaning of the words plaintiff and defendant, as used by Congress in recent legislation. It would be asking a great deal of laymen that they be certain and confident in the use of lawyers' words when lawyers themselves disagree as to their meaning. It would be grim irony to insist that our juries must constitute a representative cross section of all the people if at the same time impossible standards of performance were imposed. Moreover, in the present case, the questions propounded were not directed to each venireman separately. Instead, they called for voluntary responses upon the initiative of each. Many lawyers, remembering their own first appearances in court, will understand the trepidation of a layman who, for perhaps the first time in his life, occupies the spotlighted position of the jury box; and his reluctance to discuss with able counsel, abstract legal issues such as those implicit in the questions propounded in the present case. These are the considerations which must be kept in mind in determining whether there was such giving of false answers or concealment of material information as to constitute misconduct and require, so compellingly, the granting of a new trial as to establish abuse of discretion upon the part of the trial judge. (143 F. 2d at 376-378).

This early opinion recognizes that jurors are human beings, unlike the opinion of the Tenth Circuit in the present

case. The *Orenberg* opinion should also serve to remind everyone that there are as many innocent explanations for human conduct as there are guilty ones, and that therefore bias against a litigant should not be inferred from a juror's failure to speak up during questioning of this sort.

Presumptive implication of bias is not favored by this Court. Only last term, in *Smith v. Phillips*, 455 U. S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940, this Court refused to adopt a principle of implied bias based solely upon prosecutorial misconduct and/or juror misconduct in the context of a habeas corpus proceeding. This Court held in *Smith* that allegations of juror bias are best handled by a hearing before the trial judge, in which each side is given an opportunity to present evidence concerning the actual bias of the juror, and the actual impact of the alleged bias upon the trial. *Smith v. Phillips* stands for the proposition that new trials will not be granted automatically even where clear error appears on the record either in the form of misconduct by counsel or an indiscretion by a juror, in the absence of a finding by the trial judge based upon admissible evidence that the complaining party was deprived of a fair trial. *A fortiori*, no new trial should be granted where neither counsel nor a member of the jury has behaved improperly and there is no direct showing of bias or prejudice.

As outlined above in the argument relating to the constitutional aspects of this case, it is difficult to conceive of a situation where a presumption of bias and prejudice would be reasonable, in the context of an alleged deprivation of peremptory challenges. If the information concealed by a juror is so significant that a presumption of bias is warranted, a challenge for cause

would be proper and no peremptory challenge would be needed. A bona fide claim that a peremptory challenge, rather than an opportunity to demand challenge for cause, has been impaired will occur only under the most peculiar circumstances.

A majority of Federal Courts facing allegations of juror misconduct of this sort have refused to order new trials in the absence of evidence sufficient to warrant a challenge for cause. Five circuits apparently refuse to order new trials where the juror's failure to speak up has been unintentional: See *Atlas Roofing Manufacturing Co. v. Parnell*, 409 F.2d 1191 (5th Cir. 1969), *Vezina v. Theriot Marine Service, Inc.*, 554 F.2d 654 *after remand*, etc., 610 F.2d 251 (5th Cir. 1980); *Johnson v. Hill*, 274 F.2d 110 (8th Cir. 1960), *Hansen v. Barrett*, 186 F.Supp. 527 (D. Minn. 1960), *Morrison v. Ted Wilkerson, Inc.*, 343 F.Supp. 1319 (W. D. Mo. 1971); *Christian v. Hertz Corporation*, 313 F.2d 174 (7th Cir. 1963); *Fritz v. Boland & Cornelius*, 287 F.2d 84 (2nd Cir. 1961); and *Orenberg v. Thecker*, *supra*.

The Fourth Circuit apparently gives no special weight to the presence or absence of intentional concealment, but does not presume bias or prejudice. See *Faith v. Neely*, 41 F.R.D. 361 (N. D. W. Va. 1966). Only one reported decision outside the Tenth Circuit applies a limited presumption of bias. In *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981), it was held that deliberate concealment of information by a juror requires a new trial without further showing of prejudice. See 652 F.2d at 658. Like the Tenth Circuit, the Sixth Circuit relied upon decisions rendered prior to the adoption of the harmless error rule in adopting a presumption of prejudice.

In the case of *Laugherty v. Newcomb*, 237 F. Supp. 524 (E. D. Tenn. 1962), a new trial was denied even though the complaining party still had unused peremptory challenges, on the basis that a juror's innocent failure to answer a question due to his failure to understand the terminology used by counsel is not indicative of bias. See 237 F. Supp. at 527-529. In the Fifth Circuit, the jury's verdict will not be overturned even if the juror failed to reveal information which would have disqualified him from sitting on the jury. Such was the result in *Atlas Roofing Manufacturing Co. v. Parnell*, *supra*. In that case, the juror failed to reveal that he had been convicted of a felony some 20 years earlier. The Court of Appeals acknowledged that this information, if known, would have required the removal of the juror in question under 28 U. S. C. Section 1861(1), but held that the juror's innocent failure to reveal this information did not require a new trial in the absence of a showing of actual bias and prejudice. See 409 F. 2d at 1193.

The schism between the Tenth Circuit and the remainder of the U. S. Circuit Courts of Appeal began in 1958, with the case of *Consolidated Gas & Equipment Co. of America v. Carver*, 257 F. 2d 111 (10th Cir. 1958). In that case the jury foreman failed to reveal during voir dire that he was the plaintiff in a pending personal injury action. The Tenth Circuit reversed the order of the Trial Court denying the defendant's motion for new trial. The Tenth Circuit found an abuse of discretion in denying a new trial, because (1) the juror's injury was very similar to the injury claimed by plaintiff, and (2) the trial judge admitted that the foreman would have been excused for cause, if the court had known of the foreman's pending

action. The Tenth Circuit further found that the defendant had made a sufficient showing that it would have used a peremptory challenge against the foreman, if a challenge for cause would have been denied. See 257 F.2d at 115. The *Consolidated Gas* opinion went further than was necessary, however, in holding that the existence of an unrevealed bias required a finding that the juror was "not competent". No authority was cited for the proposition that bias alone renders a juror "incompetent". See 257 F.2d at 116.

The unfortunate dictum from *Consolidated Gas* was quickly seized upon by litigants. Juror incompetence based upon the pendency of a juror's personal injury claim was alleged in *Fritz v. Boland & Cornelius*, 287 F.2d 84 (2nd Cir. 1961). The Second Circuit distinguished *Consolidated Gas*, and rejected the dictum used by the Tenth Circuit:

Invocation of the defendant's concept of 'competency'—in its requirement of 12 such 'competent' jurors—into the factual setting of this case would result in unwarranted reversals of perfectly fair jury verdicts and would inject an unjustifiable degree of instability into the jury system. (See 287 F.2d at 86).

The Second Circuit refused to order a new trial in the *Fritz* case, despite some inference of juror bias, due to the complete absence of any evidence that the juror's bias resulted in any prejudice to the complaining litigant. See 287 F.2d at 86.

The Tenth Circuit Court of Appeals diverged even further from the main stream of Federal Decisions in *Photostat Corporation v. Ball*, 338 F.2d 783 (10th Cir. 1964). In that case four members of the jury panel failed

to reveal personal injury claims despite a request by counsel for such information. The Trial Court denied the defendant's motion for a new trial, finding that each of the jurors honestly misunderstood counsel's questions and that no juror had intentionally deceived counsel. The Tenth Circuit Court of Appeals reversed and ordered a new trial.

The *Photostat* opinion first discussed decisions relating to implied bias which were decided before the enactment of the harmless error rule in 28 U.S.C. Section 2111 and F.R.C.P. 61. The Tenth Circuit distinguished peremptory challenges from challenges for cause on the basis that peremptory challenges are made at the sole discretion of counsel and require no articulable justification. The opinion described the holding of *Consolidated Gas* in the following terms:

[In *Consolidated Gas* we] embraced the settled rule which moves the Court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected. (See 338 F. 2d at 786).

The *Photostat* opinion then went on to ignore this statement of unquestioned law. The requirement of proof of juror bias resulting in prejudice was reduced to a new and different formula:

It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was

entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right. (See 338 F.2d at 787).

The means by which the "materiality" test was derived from the principle of "bias resulting in prejudice" was not explained. It can only be surmised that the stress placed by the Court on the harmful effects of less than completely truthful answers is indicative of an excessive concern with abstract rights, without consideration of the particular means for achieving just results.

The Fifth Circuit has expressly rejected the rule of *Photostat*. In *Vezina v. Theriot*, 554 F.2d 654 (1977), after remand 610 F.2d 251, the presumption of bias and prejudice employed in *Photostat* was expressly rejected, in favor of the more usual procedure of allowing the trial court discretion to make findings of fact in each case subject to review for abuse of discretion. See 554 F.2d at 656.

A trial judge confronted with allegations of juror misconduct in the context of a motion for new trial should grant a new trial only where error has occurred. Where a litigant has been deprived of basic due process, a new trial is certainly in order. A deprivation of due process should, however, be found only where one or more members of the jury are not qualified to render a verdict. Disqualification from jury duty under 28 U.S.C. Section 1861 should be a sufficient ground for granting a new trial. A trial judge should also be entitled to order a new trial if he finds, based upon all pertinent evidence, the three elements most commonly cited by the various circuits:

- (1) The juror has concealed information from counsel, rather than merely failing to hear or understand a question;
- (2) The information concealed by the juror is, in the opinion of the trial court, indicative of actual bias against the position of the party seeking a new trial; and
- (3) The untruthful juror's bias has had some impact upon the rendition of a verdict adverse to the moving party.

The trial judge should be given wide latitude and discretion in exploring these elements. The policy considerations against inquiring into the internal workings of the jury embodied in Federal Rule of Evidence 606 should determine the nature of the inquiry.

Material circumstances which should be considered by a trial judge confronted with an alleged deprivation of the right to exercise peremptory challenges intelligently should include the following:

- (1) Did the complaining party exercise a peremptory challenge against anyone who revealed information similar to that concealed?
- (2) Would the concealed information significantly have added to the information available to counsel at the time peremptory challenges were exercised?
- (3) Did counsel for the complaining party have an adequate opportunity to inquire into the subject in question, but fail to do so?
- (4) Would the concealed information have warranted the granting of a challenge for cause, if it had been known?
- (5) Under all the facts and circumstances of the trial, does it appear to the trial court that the complain-

ing party was deprived of a fair trial despite the diligence of counsel and court in trying to select an impartial jury?

The trial judge is in a much better position to make these determinations than is any appeals court panel, since the trial judge has had an opportunity to observe the demeanor of the jurors during the course of the trial. The trial judge is also intimately familiar with the issues presented by the parties at trial, and so is a much better judge of the manner and extent to which personal circumstances might result in bias against the position taken by one of the parties.

A Court of Appeals should follow standard practice in reviewing trial court determinations on these issues. The Court of Appeals should not reverse the District Court and order a new trial absent a showing of abuse of discretion by the trial judge. If the trial judge has not abused his discretion in denying the motion for new trial, there is no compelling reason why the Court of Appeals should order a new trial on its own initiative. At all times both the trial judge and the Court of Appeals panel should obey the mandates of F.R.C.P. 61 and 28 U.S.C. Section 2111, and ignore any alleged juror misconduct which cannot be shown to have produced a prejudicial result.

III. Whether the Petitioner is entitled to a judgment in accordance with the jury's verdict under the correct standard of law for any or all of the following reasons:

(a) The facts presented by plaintiff do not establish a prima facie case of juror misconduct;

(b) The inference of prejudice suggested by plaintiff was contradicted by all evidence in the record; and

(c) Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the District Court.

When the principles of law discussed above are applied to the facts in the present case, there is no reasonable doubt that Petitioner was entitled to the entry of judgment in its favor in accordance with the jury's verdict. Respondents presented no evidence in support of their motion for a new trial which would warrant a contrary conclusion. Even the allegations made on appeal, which were not based upon anything in the District Court record, are insufficient to warrant a new trial. Certainly there has never been a showing that the District Court abused its discretion in denying a new trial.

At the District Court level, Respondents' motion for new trial contained no allegations that juror misconduct had in fact occurred. The only ground alleged in support of the motion which related to juror conduct was the claim that counsel should have been permitted to inquire generally of the jury in pursuit of evidence of misconduct. (Appendix pp. 93-94).

The only allegations of juror misconduct were made in Respondents' two motions to approach jurors. (Appendix pp. 67-71, 86-88). The first motion to approach jurors was denied on the basis that Respondents had failed to present any evidence that juror misconduct had in fact occurred. (Appendix at pp. 72-74). The second motion to approach juror Payton was granted, but with a specific finding that there was as yet no evidence in the record to substantiate a finding of bias or prejudice resulting from the alleged misconduct. (Appendix at pp. 89-90).

The only evidence submitted to the District Court in support of the contention which was so convincing to the Tenth Circuit Court of Appeals was the affidavit of John Greenwood. That affidavit indicated that juror Payton's son had suffered a broken leg. (Appendix at pp. 87-88). The affidavit neither asserted nor supported any contention that juror Payton had falsely answered a question during voir dire, as the District Court noted in its order granting the motion:

Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's questions should have elicited a response from the juror only if 1) his son was in an accident as alleged and 2) the son sustained a disability or suffered prolonged pain. (Appendix at p. 89).

The District Court was never presented with any evidence that either of these conditions were present, and therefore there was no evidence that juror Payton had answered falsely.

Under these circumstances the District Court would have abused its discretion if the motion for a new trial had been granted. If all members of the jury truthfully answered all questions put to them, there cannot be even a theoretical impairment of the right to peremptory challenge. In the absence of juror concealment, there was no analysis to be made of potential bias or prejudice.

The District Court order granting permission to approach juror Payton also noted that the undisclosed information showed no signs of having been a material consideration of counsel during the exercise of peremptory challenges. Similar information had been revealed by other jurors, and none who revealed such information were

stricken. (Appendix at p. 90). The undisclosed information was not self-evidently indicative of bias against a plaintiff in the position of Respondents. (Appendix at pp. 89-90).

These preliminary findings by the District Court should have been given the same respect as any other finding of fact made by a trial judge in the context of a motion for new trial. Based upon the entire record presented to the District Court, it could reasonably have been found that juror Payton truthfully answered all questions put to him, that any failure to reveal information on his part was not indicative of bias, that the information which was not disclosed was insignificant or trivial, and that such information was not in fact material to counsel in deciding how to conduct voir dire or to exercise peremptory challenges.

The Court of Appeals never made any analysis of the rectitude of the District Court's decision. No consideration was given to, nor was mention made of, the standard for review of orders denying new trials. The Court of Appeals made determinations of fact and drew conclusions of law contrary to those of the District Court, on the basis of factual allegations appearing nowhere except in Respondents' appeal brief. The findings and conclusions of the Court of Appeals are contradicted by the facts related by Petitioner in its appeal brief.

Even if the facts alleged by Respondents were accepted as true, and even if these facts had been presented at the District Court level, they would not constitute a *prima facie* showing of juror misconduct indicative of bias and resulting in prejudice against Respondents. Under the proper legal standard a juror has not concealed information when he has fully answered a question in accordance

with his understanding of the question. A juror's failure to conform to the standard of behavior of a hypothetical "reasonable juror" is at most negligence, not concealment. Even if an "unreasonable" answer were to be considered a concealment, there has never been a contention of actual bias or prejudice in this case, let alone any evidence of bias or prejudice.

The only alleged difference that a "reasonable" answer by juror Payton would have made is the surmise that counsel might have conducted his voir dire examination of juror Payton more thoroughly than otherwise. There has never been a contention, and certainly there has never been a finding by any court, that peremptory challenges more likely than not would have been used differently than they were in fact. There has never been a contention, nor a finding by any court, that juror Payton was in fact biased against a plaintiff in the position of Respondents. There has never been a contention, or a finding by any court, that the unrevealed injury to juror Payton's son influenced the jury's verdict in any way.

The transcript of voir dire examination, and the clerk's minute sheet setting forth the peremptory challenges of the parties, reveal no indication that any peremptory challenge was exercised on the basis of a venireman's attitude toward pain, suffering or injury. Each juror was asked to affirm that he or she felt capable of deciding the case solely on the basis of the evidence presented, uninfluenced by any pre-existing personal preference for or against either of the parties. (Appendix pp. 47-48, 57-62).

Last but of greatest significance is the fact that juror Payton's alleged bias could only rationally have affected his assessment of damages. There is no rational explana-

tion for how a "particularly narrow concept of what constitutes a serious injury" can induce a juror to find that a lawn mower is not defective or unreasonably dangerous, as all jurors unanimously did in this case. Surely there is no inference so compelling that a reversal of the District Court's decision is in order.

By the Tenth Circuit's own prior decisions, the failure of Respondents to inform the District Court of juror Payton's post-trial comments prohibits reversal on appeal on the basis of those comments:

It is fundamental that a party seeking reversal must establish that alleged trial errors were prejudicial. Matters not appearing in the record will not be considered by the Court of Appeals. See *Neu v. Grant*, 548 F. 2d 281 (10th Cir. 1977), at 286.

This principle is in accordance with the general principles of appellate review quoted from *Hormel v. Helvering*, *supra*.

Counsel exercised their peremptory challenges intelligently, by striking those veniremen who showed some indication, however slight, of empathy for product designers and manufacturers. Any challenge exercised in anticipation of a juror's unwillingness to award substantial damages would have been wasted in this case. The Tenth Circuit therefore has ordered a new trial because Respondents' counsel were deprived of an opportunity to be misled into squandering a challenge. Such a result cannot be good law, and it certainly is not justice.

CONCLUSION

For all of the above stated reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the judgment of the District Court should be reinstated. The decision of the Court of Appeals is erroneous because error and prejudice were conclusively presumed on the basis of contentions of fact not contained in the record and not presented at the District Court level. The factual allegations made by Respondents at the appellate level are insufficient to raise an inference of juror concealment of material information, juror bias, or prejudice to the rights of Respondents. Unquestionably these factual allegations are insufficient to warrant a reversal of the District Court's findings to the contrary.

In the alternative, if it should be found that a prima facie case of juror misconduct was made, the case should be remanded for a hearing before the District Court. In the event of remand, the District Court should be instructed to consider all pertinent and admissible evidence in determining whether concealment has occurred, whether the concealment if any was material, and whether such concealment is indicative of bias resulting in prejudice to the rights of Respondents.

Respectfully submitted,

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No. 82-958

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ALEXANDER L. STEVAS,
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

McDonough Power Equipment, Inc.,
Petitioner,
vs.

BILLY G. GREENWOOD, a minor child,
by his parents and natural guardians,
JOHN G. GREENWOOD and FRED A GREENWOOD,
JOHN G. GREENWOOD, individually; and
FRED A GREENWOOD, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Was Certiorari improvidently granted?
2. Is Petitioner's claim of deprivation of its constitutional right of trial by jury reviewable?
3. Did the Court of Appeals correctly rule Respondent's right to peremptory challenge was impaired?
4. Did the Court of Appeals correctly rule the suppressed information indicated probable bias?
5. Was the Court of Appeals correct in not remanding the case for a hearing?
6. Is petitioner entitled to entry of judgment upon the verdict of the jury?

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

McDonough Power Equipment, Inc.,
Petitioner,
vs.

BILLY G. GREENWOOD, a minor child,
by his parents and natural guardians,
JOHN G. GREENWOOD and FREDA GREENWOOD,
JOHN G. GREENWOOD, individually; and
FREDA GREENWOOD, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

ADDITIONAL RULES THE CASE INVOLVES

1. U.S.D.C., Kan. Rule 23a

Lawyers appearing in this Court,
as well as their agents or employees,
shall refrain from approaching

jurors who have completed a case, unless authorized by the Court. Such authorization will be considered only upon formal application to the Court and hearing at which just cause shall be shown.

2. Rule 606(b), Federal Rules of Evidence

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

3. U.S.D.C., Kansas Oath Administered to Petit Jury.

You and each of you do solemnly swear that when you are examined by the court or counsel as to your qualifications to serve as jurors at this term of court, you will true answers make to such questions as may be propounded to you touching your qualifications to serve a jurors. So help you God.

STATEMENT OF THE CASE

Respondent finds it necessary to restate the case. Petitioner's "Statement of the Case" contains statements which do not appear in the record, is written in overly subjective terms, and misstates the holding below.

This is a product liability action which stems from the loss of both feet by three-year-old Billy Greenwood when he came in contact with the blades of a Snapper riding mower manufactured and sold by Petitioner. Respondent's theory of liability was that of strict liability under Restatement (Second), Torts §402A. Respondent adduced proof that the lawnmower in question was defective in that:

(a) The blade was exposed below the deck in that:

- (1) the blade bar as manufactured was not straight within Petitioner's manufacturing tolerances such that the blade level was below the deck, causing or at least aggravating the injury to Respondent's left foot;
- (2) defectively designed since proper design called for the blade to be recessed inside the deck more than one-eighth inch as designed; and

(b) The blade brake-clutch was defectively designed in

- (1) failure to provide emergency method of controls (deadman control), in connection with
- (2) inadequate stopping time, and
- (3) durability.

The case was submitted to the jury under Respondent's theory of strict liability. The court allowed the jury to compare the fault of Petitioner, Jeffrey Morris (operator of the mower), Ira Morris (owner of the mower), and Freda Greenwood Billy's mother). The ultimate apportionment of fault by the jury was:

Defendant -- 0%
Jeffrey Morris -- 20%
Ira Morris -- 45%
Freda Greenwood -- 35%

Total -- 100%

In direct disobedience of the Court's instructions (R. Vol. XXIV 1980) and the verdict

form (J.A.66), the jury assessed damages at Zero Dollars (\$0.00). (R. Vol. XIV 1996). The Court instructed the jury to return to deliberate concerning damages, since it was obvious this little boy had lost both feet and suffered some damage. (R. Vol. XXIV 1998-2001). The jury returned again and assessed damages at Three Hundred Seventy-Five Thousand Dollars (\$375,000.00), (R. Vol. XXIV 2004). On April 25, 1980, the court entered judgment that Respondent take nothing, that the action be dismissed on the merits, and that Petitioner recover its costs. (R. Vol. II 320).

During voir dire, the jury panel was asked by counsel for Respondent if they or any member of their families had been in an accident and sustained a disability or prolonged pain or suffering. (J.A. 19). Juror Cook answered affirmatively (J.A. 19); he was questioned by Respondent's counsel as to whether a claim was made, questioned as to his impartiality and allowed to remain

on the jury. (J.A. 38-40).¹ Juror Payton

¹ Petitioner places much significance on this fact and even suggests this is the first factor a Court should consider once it is discovered counsel has been deprived of information in exercising the right of peremptory challenge. Respondent submits Petitioner's point is at best irrelevant and at worst absurd. The question jury foreman Payton failed to answer is a preliminary one. It is a tool to discover whether the juror made a claim as a result of the accident (which itself says a lot about the juror's attitude about claims), what kind of injury, what were the results, or if no claim was made, why not? It is the response to these questions (once the juror has responded affirmatively to the preliminary question) in which counsel is interested when exercising the right to peremptory challenge. Also significant is the opportunity to carefully observe the often more important non-verbal communication cues given as the juror speaks. See National Jury Project, Jury Work, (1983) pp. 11-25 to 11-33; Ekman and Friesen, "Non-Verbal Leakage and Clues to Deception," Psychiatry, (1969), 32, 88-106; Knapp, Essentials of Non-Verbal Communication (1980); Werchick, "Method, Not Madness - Selecting Today's Jury," Trial, Vol. 18, No. 12 (Dec. 1982). It has been recognized that peremptory challenges are often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Swain v. Alabama, 380 U.S. 202, 220, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), quoting Lewis v. United States, 146 U.S. 370, 376, 36 L.Ed.1011, 13 S.Ct. 136 (1892).

remained silent. Counsel for Petitioner asked the jurors whether any among them, either themselves, anyone in their immediate family or a neighbor ever had a child injured on any kind of a mechanical device or machinery. (J.A. 52). Juror Cook responded that his son at age 6 got his finger in a bike chain once and at age 13-15 got his hand in a power saw. (J.A. 52-3). Juror Payton remained silent. Counsel for Petitioner asked the jurors whether any among them, either themselves, their immediate family, close friend or a neighbor had ever been injured on any kind of a machine. (J.A. 53). Juror Finnigan responded her husband had been injured on the job 15 years ago. (J.A. 53-4). Juror Payton remained silent. Counsel for Petitioner re-asked the same question but with respect to mechanical devices at home. (J.A. 54). Juror Cook responded that before he even met his wife, she got her hand in a wringer washing machine. (J.A. 54-5). Juror Payton remained silent.

Following the trial, Respondent discovered jury foreman Payton had a son who was injured when a truck tire exploded. (J.A. 88). Under local U.S. District Court Rule 23A, counsel for Respondent filed a motion with supporting affidavits indicating juror misconduct and requested permission to question the jury on whether they had answered the questions truthfully during voir dire, plus seven other matters of concern. (J.A. 66-71). The trial court denied the motion stating Respondent had failed to show "just cause" for the court to infer misconduct and allow the jury to be approached. (J.A. 72). Respondent then filed a second motion, including another affidavit by Respondent's father, a U.S. Navy recruiting officer, stating that the jury foreman's son had applied to enlist in the U.S. Navy and the son's application stated he had been seriously injured in a truck tire explosion. (J.A. 86-88). The trial court "generally overruled" the motion but granted "brief and polite" inquiry to the limited degree of

determining whether juror Payton's son was in an accident as the affidavit affirmed, and if the son sustained a disability or prolonged pain or suffering. (J.A. 89). The trial court stated "the inquiry should be undertaken telephonically or at a place convenient to the juror" and that juror Payton was not to be summoned to Topeka, Kansas, solely for this purpose. (J.A. 89). A conference telephone call was conducted with Respondent's attorney, Petitioner's attorney and juror Payton participating. During the telephone conversation juror Payton acknowledged the fact of injury to his son, but contended that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life" and "all his children had been involved in accidents." Respondent requested oral argument and leave of court to subpoena the jurors to give testimony at the hearing on his Motion for a New Trial. (J.A. 90-94). The trial court denied the motion without

argument. (J.A. 106). ²

In the Court of Appeals, Respondent urged eight different issues justifying a new trial. (Brief of Appellant). One of those issues was whether the trial court erred in denying Respondent's motions to approach the jurors; erred in denying leave

² We find audacious Petitioner's repeated reference to Respondent's asserted failure to report the results of the Payton telephone interview to the trial court and, for the first time ever, a contention the issue was waived by Respondent on that account. Respondent, despite affidavits indicative of juror misconduct, was at first entirely precluded from interviewing the jurors. (J.A. 67;72). Then, after filing a second motion with another supporting affidavit which was generally overruled with a strong suggestion that the matter be handled by telephone, Respondent was limited to a very narrow area of inquiry. (J.A. 86; 89). The trial judge already had made his attitude known, stating, "Frankly, the Court is not overly impressed with the significance of this particular situation." (J.A. 89). Respondent was then denied requested oral argument on his motion for new trial and denied requested leave to subpoena jurors to give testimony at the requested hearing. (J.A. 94;106). Respondent was thwarted in his attempts to make a post-trial record more extensive than that made.

to subpoena jurors to give testimony at a hearing on Respondent's Motion for a New Trial; and whether Respondent was entitled to a new trial for juror misconduct. (Brief of Appellant). Respondent specifically raised his Constitutional right to trial by an impartial jury. (Brief of Appellant at 16). Respondent specifically argued his right to peremptory challenge had been impaired. (Brief of Appellant at 15-20). Petitioner raised no constitutional questions in the Court of Appeals (See Brief of Appellee), nor in its Petition for Writ of Certiorari.

In the Court of Appeals, Respondent pointed out that during the telephone conversation, juror Payton contended that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life" and "all of his children had been involved in accidents." (Brief of Appellant at 7). Petitioner expressly adopted these

facts but added that jury foreman Payton did not regard the injury as "severe" and did not result in "prolonged pain and suffering." (Brief of Appellee at 18). Petitioner argued (1) there was no juror misconduct (Brief of Appellee at 18), (2) Respondent had not shown impairment of his right to peremptory challenge in light of the inferences to be drawn from the manner in which Respondent did exercise peremptory challenges (Brief of Appellee at 18-19), (3) that although Consolidated Gas and Equipment Co. of America v. Carver, 257 F.2d 111 (10th Cir. 1958) and Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964) were correct, they were distinguishable (Brief of Appellee at 19-20), and (4) Respondent failed to timely object to juror Payton's disqualification (Brief of Appellee at 20).

In the Court of Appeals, (1) Petitioner at no time suggested that granting Respondent a new trial based upon prejudicial impairment of Respondent's right to peremptory challenge

would deprive Petitioner to its right to trial by jury, as contended in this Court; (2) Petitioner at no time contended that Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the trial court, as contended in this Court; and (3) Petitioner at no time suggested the Court of Appeals was applying an erroneous standard of law, as contended in this Court; to the contrary, Petitioner said:

The cases cited by Plaintiff quite correctly hold that withholding information called for in answer to a question on voir dire by a venireman can constitute ground for new trial if, and only if, the record shows probable bias on the part of the juror with consequent prejudice to the unsuccessful litigant. Consolidated Gas and Equipment Co. of America v. Carver, 257 F.2d 111 (10th Cir. 1958) and Photostat Corp. v. Hall, 338 F.2d 783 (10th Cir. 1964). In both cases information concerning injuries, claims and suits involving the veniremen and their immediate families was withheld and the defendant in a bodily injury suit successfully claimed prejudice. (Brief of Appellee at 19. Emphasis added in first sentence; emphasis in original in last sentence).

Apparently Petitioner approved of the law until it was applied equally to Plaintiffs

and Defendants.

Contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals held Payton's refusal to answer the question posed on voir dire prejudiced Respondent's right to peremptory challenge as a matter of law because the information concealed was of sufficient cogency and significance to cause the Court to believe counsel was entitled to know of it. (687 F.2d at 342). Further contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals held that the suppressed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury. (687 F.2d at 343). Further contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals did not base its decision upon what influence the suppressed information might or would have had, because such an inquiry would be unworkable. (687 F.2d at 342 and at n. 1, 342-3).

SUMMARY OF ARGUMENT

Certiorari was improvidently granted. Courts, including this Court, agree impairment of the important right of peremptory challenge is reversible error without a showing of prejudice. The only issue the case presents is whether Respondent's right of peremptory challenge was impaired under the particular circumstances in this civil product liability case. The opinions of the Tenth Circuit Court of Appeals in Consolidated Gas, *supra*, and Photostat, *supra*, which are established precedent for the decision below and which Petitioner attacks here, are the law of this case because Petitioner told the Court of Appeals those decisions were correct.

Petitioner's claim of deprivation of its Seventh Amendment right to trial by jury is not reviewable because it was never raised in the court below nor in the Petition for Writ of Certiorari. Even if reviewable, the Seventh Amendment does not foreclose an

appellate court's duty to correct errors of law, here impairment of the right of peremptory challenge.

The Court of Appeals correctly ruled Respondent's right of peremptory challenge was impaired. Impairment of the right of peremptory challenge is nonetheless an impairment of a substantial right irrespective of the good faith or intent of a venireman in suppressing requested significant information. The right of challenge includes the incidental right that information elicited on voir dire shall be the truth. Here, in suppressing the fact of serious injury to his son in a product liability context for which a claim was not made, jury foreman Payton did not tell the truth. In any personal injury case, involvement with injuries by a juror or his family is important information to counsel on both sides. It is the means by which both counsel develop and explore in a specific personal context the attitudes and preconceived opinions of veniremen toward injuries and making claims for money as a result

of injuries. No personal injury attorney, plaintiff or defense, can honestly argue this is not significant information he or she seeks to discover on voir dire for the dual purpose of uncovering attitudes which lead to challenges for cause and informed use of the right of peremptory challenges.

The inquiry ends here. Impairment of the right of peremptory challenge with resulting reversible error is established. We nevertheless respond to other arguments made by Petitioner.

The Court of Appeals correctly ruled the information suppressed by jury foreman Payton indicated probable bias. This inquiry begins with recognition that due process requires trial by an impartial jury, a necessary and important part of which is the right of peremptory challenge. Next we must acknowledge the fact there are many persons who harbor a strong bias against negligence or product liability actions wherein injured persons seek "blood money." Under the undisputed facts developed in the post-trial

telephone interview, jury foreman Payton revealed not only a calloused concept of what constitutes a serious injury, but also a cavalier attitude toward making product-related claims. A comment on voir dire like "accidents are a part of life" is a bell-ringer to any plaintiff's personal injury trial attorney. Jury foreman Payton's suppression on voir dire of a product-related injury to his son coupled with an attitude that "accidents are a part of life" is indicative of probable bias against product-related claims.

This Court has never required a showing of actual bias where impairment of the right of peremptory challenge is at issue. "Indeed, such a requirement would be wholly inconsistent with the entire purpose of peremptory challenge. In other contexts, this Court historically has not required a particular showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party; has regarded the absence of a balanced perspec-

tive in jury selection procedures as a recognizable form of prejudice, without requiring a specific showing of bias against the individual defendant; has conclusively presumed juror bias and prejudice even where the jurors involved denied it; has utilized a presumption of prejudice and placed the burden on the Government to overcome the presumption; and has insisted that criminal defendants be given a fair and meaningful opportunity in voir dire to determine whether prospective jurors are biased. Given that fairness and reliability of jury determinations are at stake, this is not too high a standard.

The Court of Appeals was also correct in not remanding the case for a hearing. Impairment of the right of peremptory challenge is reversible error without a showing of prejudice. Remand for a hearing to determine the probable or actual bias of jury foreman Payton is thus superfluous. Additionally, a hearing to determine the actual or probable bias of jury foreman Payton through the mouth of jury foreman

Payton would surely be a hollow and futile opportunity. This Court, as well as others, has recognized that proof of actual bias is virtually impossible. Finally, in view of Rule 606(b), Fed.R.Evid., remand for a hearing may be pointless.

Petitioner is not under any circumstances entitled to entry of judgment upon the verdict of the jury because there remain several additional assignments of error not decided below. If the judgment of the Court of Appeals not be affirmed, the only appropriate course is to remand the case to the Court of Appeals.

ARGUMENT AND AUTHORITIES

I. CERTIORARI WAS IMPROVIDENTLY GRANTED

Now that the Court has the entire record, Respondent suggests the Court take a second look at the grant of certiorari in this case. As noted, Petitioner adopted the facts pertaining to juror Payton in its brief in the

Court of Appeals. We wonder why Petitioner continues to refer to the Payton interview using such terms as "Plaintiff's counsel's report" and "Plaintiff's allegations." Legally too Petitioner has changed its position. As noted, Petitioner told the Court of Appeals its decisions in Consolidated Gas, supra, and Photostat, supra, were correct but distinguishable. That is the law of this case. Now Petitioner vehemently attacks both decisions which are precedent and support for the decision below.

On this record, Respondent submits certiorari was improvidently granted.

II. PETITIONER'S CLAIM OF DEPRIVATION OF ITS CONSTITUTIONAL RIGHT OF TRIAL BY JURY IS NOT REVIEWABLE.

Petitioner never contended in the Court of Appeals that granting Respondent a new trial for prejudicial impairment of the right to peremptory challenge would deprive Petitioner of its Seventh Amendment right to trial by jury. To the contrary, similar

rulings in Consolidated Gas, *supra*, and Photo-stat, *supra*, were stated to be correct by Petitioner. Neither did Petitioner claim deprivation of Constitutional rights or even raise Constitutional questions in its Petition for Writ of Certiorari. Questions not raised below, nor in the Petition for Certiorari - especially Constitutional questions - will not be considered for the first time in the Supreme Court. Supreme Court Rules 21.1(a) and 34.1(a); Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973); Andrews v. Louisville & N.R.Co., 406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 (1972); Quilloin v. Walcott, 434 U.S. 246, 253 n. 13, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978).³

³ Even if reviewable, Petitioner was not deprived of its Constitutional right to trial by jury. The Court of Appeals did not re-examine any facts found by the jury. Granting Respondent a new trial for impairment of Respondent's right to peremptory challenge does not deprive Petitioner of its Seventh Amendment right to trial by jury. Nothing in the Seventh Amendment forecloses an appellate court's duty to correct errors

III. THE COURT OF APPEALS CORRECTLY RULED RESPONDENT'S RIGHT TO PEREMPTORY CHALLENGE WAS IMPAIRED.

Petitioner's entire argument asolutely ignores that we believe is the only issue in this case; impairment of Respondent's right to peremptory challenge.

(a) Impairment of the right of peremptory challenge is reversible error without a showing of prejudice.

In ruling that a prosecutor could constitutionally use his peremptory challenges to strike all of the accused's race from the jury, the Court in Swain v. Alabama, 380 U.S. 202, 219, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965) said:

The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S. 370, 36 L.ed 1101, 13 S.Ct. 136; Harrison v. United States, 163 U.S. 140, 41 L.ed. 104, 16 S.Ct. 961; cf. Gulf, Colorado & Santa Fe R.Co. v. Shane, 157 U.S. 348, 39 L.ed. 727, 15 S.Ct.

(continuation of Footnote 3)
of law. See e.g. Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 460 (9th Cir. 1963), cert. denied, 376 U.S. 970, 12 L.Ed.2d 84, 84 S.Ct. 1136 (1964).

641. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, 146 U.S. 370, 378 36 L.Ed. 1011, 1014, 13 S.ct. 136.

Accord: Carr v. Watts, 597 F.2d 830 (2nd Cir. 1979). The point was succinctly stated by the Court in Shulinski v. Boston & M.R.R. 83 N.H. 86, 139 A. 189, 191 (1927):

The question is whether a proper tribunal was established, and not whether an improperly established tribunal acted fairly.

Contrary to Petitioner's assertions, the "good faith" of the non-disclosure and the "actual bias" of the juror are completely irrelevant to the determination of impairment of peremptory challenge. The whole purpose of the right of peremptory challenge is to allow removal of "jurors who, in the opinion of counsel, have unacknowledged or unconscious bias." Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981). Were the juror actually biased, he would be excused for cause. All the party need prove is that by some means the right to exercise

peremptory challenge was impaired.

(b) The right of challenge includes the incidental right that juror responses be true.

"Voir dire" means "to speak the truth."

All prospective jurors in the United States District Court for the District of Kansas, prior to answering questions on voir dire, are given this oath:

You and each of you do solemnly swear that when you are examined by the court or counsel as to your qualifications to serve as jurors at this term of court, you will true answers make to such questions as may be propounded to you touching your qualifications to serve as jurors. So help you God.

Of course, the right to challenge has little meaning if it is not accompanied by the right to ask relevant questions on voir dire. The statutory right of peremptory challenge, given by Congress in furtherance of securing a Constitutionally impartial jury and preserving the integrity of jury proceedings, includes the incidental right that information elicited of prospective jurors on voir dire shall be the truth. Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964).

(c) In a personal injury case, a juror's prior involvement with injuries is important information to counsel on both sides.

In any personal injury case, a prospective juror's involvement in injury accidents is a crucial subject into which both plaintiff and defense counsel inquire for the dual purpose of uncovering attitudes which lead to challenges for cause and peremptory challenge.

Defense counsel are interested for a number of good reasons. For example, if a juror or someone in the juror's family or a friend has been injured and made a claim, defense counsel want to know if his client was involved; if so, the juror may very well not be able to put that aside. Also, defense counsel know that jurors who, or whose family members have been involved in an accident and have made a claim can reasonably be expected to identify with the plaintiff. They are much more likely to hold a firm belief that a person who has been injured through the fault of another is

entitled to compensation. They are also, depending upon the type of their experience, more likely to be aware of insurance aspects, the fact that counsel fees and expenses will be deducted from the damage award, and the fact that some insurance liens or workers' compensation subrogation interest may have to be paid from the damage award. During questioning defense counsel may look for signs of consumerist tendencies or attitudes in the jurors' responses. On the other hand, defense counsel might not challenge a juror just because a juror has been injured and made a claim. Perhaps counsel feels a good rapport with the juror. Perhaps the injury occurred and the claim was made in a no-fault context. Perhaps the juror, through gesture or body language, appears half-way apologetic about having made a successful claim. Or maybe counsel just feels less comfortable with three other jurors and decides, using his best intuitive judgment, to use his peremptory challenges on three more unfavorable jurors.

Plaintiff's counsel is likewise interested in jurors' personal injury experiences. Once a juror responds that he or a family member has been injured, counsel needs to know if a claim was made. If a claim was not made, why not? Responses encompass the entire range of human attitudes on the subject - some reveal bias, some do not. For example, one might receive a response like "I don't believe in making claims for money," or "I think everyone should take responsibility for their own acts," or "Accidents are just a part of life." On the other hand, one might receive responses like "I didn't know I could," or "It wasn't very serious," or "I settled with the other guy without a claim." Additional questions are asked depending upon the response received. The information developed may lead to a challenge for cause (e.g. where the juror holds some religious, philosophical or personal opinion that no one deserves money for being injured; or the juror could not award money damages for pain and suffering, etc.). The information developed at least certainly enables

counsel to make an informed use of peremptory challenges (e.g. "bellringers" to plaintiff's counsel are jurors' expressions of ideas like "a reward" for "an accident," and "accidents are a part of life"). On the other hand, plaintiff's counsel might have good reason not to challenge a juror who has been injured but not made a claim. Perhaps counsel is satisfied with the response. Perhaps counsel feels a good rapport with the juror. Perhaps the injury was taken care of by workers' compensation without the necessity of a formal claim.⁴ Or maybe, considering all the responses of all the jurors, counsel uses his best intuitive judgment to deselect three other jurors who counsel considers lean in favor of defendant.⁵

⁴ In response to counsel for Respondent's question, Juror Cook explained his wife's injury involved workers' compensation. (J.A. 19,38-9).

⁵ For all the reasons stated and others, Petitioner's suggestion that a court look to whether the complaining party exercised a peremptory challenge against anyone who revealed information similar to that concealed

Asking veniremen about prior injuries to each of them or family members is the primary means used by both plaintiff and defense counsel to determine jurors' opinions

(continuation of Footnote 5)
entirely misses the point. Also, the question counsel must decide is not whether a particular juror is in fact partial, but which jurors are most likely to be partial, based upon the information given. This is especially so under the strike system utilized in the trial court, where all the veniremen are known to the parties before striking begins. See Swain v. Alabama, supra, 380 U.S. at 221.

In response to questioning by counsel for Petitioner, jurors Cook and Finnigan described injuries for which a claim was not made. (J.A. 52-55). In accordance with usual procedure, counsel for Respondent did not conduct another voir dire after counsel for petitioner. Obviously, based upon all the other factors which are also important to counsel in deciding how to exercise the right of peremptory challenge, counsel for Respondent either was satisfied that the state of mind of jurors Cook and Finnigan was not antagonistic to Respondent's claim or decided to exercise his challenges on three more unfavorable jurors. This does not mean the information suppressed by jury foreman Payton was unimportant; it is simply one important factor which, depending upon the individual venireman, may or may not tip the balance and result in a peremptory challenge.

toward injuries and claims within the limited time allotted voir dire in federal court. Indeed, in this case, it was the only means utilized.

If a juror conceals information about an injury experience, both counsel are deprived of information which may lead to a challenge for cause, and certainly of information of sufficient significance that counsel are entitled to know of it in exercising the right to peremptory challenge.

Under the undisputed facts in this case, jury foreman Payton failed to reveal a broken leg injury to his son as a result of a truck tire explosion, despite several opportunities in questioning by both counsel. Even after other jurors' responses gave Mr. Payton further indication of the information sought,⁶ Mr. Payton continued to remain silent. Essentially, Mr. Payton's post-trial stand was that the voir dire questions were trivial questions

⁶ Juror Cook even related such a minor incident as his six-year-old son getting his finger caught in a bike chain once. (J.A. 52).

and made no difference to him. However, counsel was deprived of information and opinions which may have led to a challenge for cause; counsel was certainly deprived of information and opinions of sufficient significance that counsel was entitled to know of it when exercising the "arbitrary and capricious right" to peremptory challenge which "must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, supra, 146 U.S. at 378.

Several courts have held that in a personal injury case a juror's prior experience with injuries and/or injury claims by or against himself is significant information counsel is entitled to know in exercising the right of peremptory challenge. In Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 984 (1933), where a juror had not revealed a personal injury claim pending against him, the court stated:

The information which was sought to be elicited by the question addressed to the jury panel, was

pertinent to enable the plaintiffs to intelligently exercise their challenges, a valuable right.

The Court in Drury, supra, 57 S.W.2d at 984-5, went on to summarize the principles announced in Shulinsky v. Boston & Maine R.R., supra, as follows:

When the right of challenge is lost or impaired, the statutory conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the right of challenge must be condemned; a litigant cannot be compelled to make a peremptory challenge until he has been brought face to face in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice; the right to reject jurors by peremptory challenge is material in its tendency to give the parties assurance of the fairness of a trial in a valuable and effective way; the terms of the statutes with reference to peremptory challenges are substantial rather than technical; such rules, as aiding to secure an impartial, or avoid a partial,

jury, are to be fully enforced; the voir dire is of service not only to enable the court to pass upon a juror's qualifications, but also in assisting counsel in their decision as to peremptory challenge; the right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established; if false information prevents a challenge, the right is so disabled and crippled as to lose its essential value and efficacy, as to amount to its deprivation; the fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that the fact accounts for the verdict; it is highly important that the conflicting rights of individuals should be adjudged by jurors as impartial as the lot of humanity will admit; next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish

their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects; the fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; that the injury is brought about by falsehood, regardless of its dishonesty, and the effect of the information is misleading, rather than a purpose to give misleading information is the gist of the injury; when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.

Drury, supra, has been somewhat qualified in Kentucky. In Crutcher v. Hicks, 257 S.W.2d 539 (Ky. 1953), the Court stated that if the false information is of such a character as to indicate probable bias on the part of the juror, it may be presumed that a free exercise of the right of peremptory challenge has been so restricted as to result in prejudice to the party affected. Also see Kansas City Southern R.

Co. v. Black, 395 P.2d 416 (Okla. 1964) - new trial granted where one juror failed to reveal that he was himself considering suing defendant, and another juror failed to reveal her son had recovered damages in another personal injury suit; Dalton v. Kansas City Transit Inc., 392 S.W.2d 225 (Mo. 1965) - new trial granted defendant where juror concealed numerous prior claims, because he thought them unimportant; Morris v. Zac Smith Stationery Co., 274 Ala. 467, 149 So.2d 810 (1963) - new trial granted defendant where juror failed or refused to reveal previous negligence suit by son; Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19 (1957) - new trial granted defendant where juror failed to state mother had pending negligence action; Marshall v. Brown, 608 S.W.2d 105 (Mo.App. 1980) - new trial granted defendant where juror failed to reveal prior claim; Kaminski v. Kansas City Public Service Co., 175 Kan. 137, 259 P.2d 207 (1953) - new trial granted defendant where two jurors failed to reveal prior personal injury claims; Pierce v. Altman, 147 Ga.App. 22, 248 S.E.2d

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34 (1978) - new trial granted plaintiff where juror failed to reveal he had been a defendant in a personal injury action four years earlier; Headrick v. Dowdy, 450 S.W.2d 161 (Mo. 1970) - new trial granted plaintiff where jury foreman failed to reveal he had been unsuccessful plaintiff in personal injury action; Fiorelli v. Yellow Cab Co. of Cleveland Inc., 30 Ohio Ops 2d 232, 190 N.E.2d 58 (1963) - new trial granted defendant where juror with pending personal injury claim remained silent on excuse she did not think it concerned defendant.⁷

Respondent submits the Court of Appeals correctly ruled the information concealed by jury foreman Payton was of sufficient significance that Respondent was entitled to

⁷ See Broeder, Voir Dire Examinations: An Empirical Study, 38 So. Cal. L. Rev. 503 at 510-515 (1965) for an enlightening actual case study discussion of jurors guilty of voir dire deception, based on a study of 23 cases tried in a midwestern Federal District Court and involving 225 juror interviews.

know of it, thereby impairing Respondent's right to peremptory challenge. Because impairment of the right of peremptory challenge is reversible error without a showing of prejudice, the inquiry ends here.

Respondent will, nevertheless, proceed to respond to the arguments made by Petitioner.⁸

IV. THE COURT OF APPEALS CORRECTLY RULED THE SUPPRESSED INFORMATION INDICATED PROBABLE BIAS.

(a) Due process requires trial by an impartial jury, a necessary part of which is the peremptory challenge.

"A fair trial in a fair tribunal is a basic requirement of due process." In re

⁸ Petitioner suggests harmless error is involved in this case. An error is harmless where, for example, a challenge for cause should have been sustained but the juror was challenged peremptorily by one who did not exhaust his peremptory challenges. Impairment of the right to peremptory challenge is never harmless error. Allowing a case to be decided by a juror in whose mind exists a probable bias is never harmless error.

Murchison, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955). A fair trial presupposes an impartial, indifferent jury. Irvin v. Dowd, 366 U.S. 717, 722, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1951).

A criminal defendant's right to an impartial jury arises from both the Sixth Amendment and principles of due process. See Ristaino v. Ross, 424 U.S. 589, 595, n. 6, 47 L.Ed. 2d 258, 96 S.Ct. 1017 (1976). Civil litigants, like criminal defendants, have a constitutionally protected right to complete consideration of their case by an impartial jury. Hasson v. Ford Motor Co., 185 Cal. Rptr. 654, 650 P.2d 1171 (1982).

The right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. Perhaps the most important technique available to serve this end is the jury challenge. Peremptory challenges, unlike those for cause, may be made for any reason, or for no reason. Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965).

Peremptory challenges are a "necessary part of trial by jury." *Id.* at 219. Indeed, the first Justice Harlan, speaking for a unanimous Court, stated the right to challenge was "one of the most important of the rights secured to the accused" and that "[a]ny system for the empanelling of a jury that [prevents] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." Pointer v. United States, 151 U.S. 396, 408, 38 L.Ed.208, 14 S.Ct. 410 (1894). Especially see People v. Williams, 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869 (1981) for an excellent and thorough discussion, with scientific studies noted which are hereby incorporated by reference, of the importance of voir dire and its significance in relationship to the right of peremptory challenge.

Our courts have become increasingly aware that bias often deceives its host by distorting his view not only of the world around him, but also of himself. Hence although we must presume that a potential juror is responding

in good faith when he asserts broadly that he can judge the case impartially (citation), further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome. And although his protestations of impartiality may immunize him from a challenge for cause (see Pen. Cod. § 1076), they should not foreclose further reasonable questioning that might expose bias on which prudent counsel would base a peremptory challenge. For instance, although a juror has asserted his willingness to presume defendant's innocence, "careful counsel would exercise a peremptory challenge if a juror replied that he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire." (United States v. Blount, (6th Cir. 1973), 479 F.2d 650, 651.)

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...it can no longer be argued seriously that voir dire is properly restricted to a search for legally cognizable bias only.

It has always been understood that public support for a system of justice depends not only on the capacity of that system to render justice in fact, but also on its ability to project to the parties and public an unimpeach-

able image of fairness. The peremptory challenge has long acted as a fixative for preserving that image.

* * *

Although it is still ordinarily true that no reason must be given for the exercise of peremptory challenges (citation), it is also true they are of little value to the accused or the state if counsel is forced to utilize them unaided by relevant information.

* * *

Because the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury (see Swain v. Alabama (1965) 380 U.S. 202, 219-221 [13 L.Ed.2d 759, 771-773, 85 S.Ct. 824]; Pointer v. United States (1894) 151 U.S. 396, 408 [38 L.Ed.208, 213-214, 14 S.Ct. 410]), questions directed at its intelligent exercise manifestly fall within the bounds of the "reasonable inquiry" to which counsel are entitled. (Pen. Code, § 1078.)

The federal courts agree, acknowledging that "if [the constitutional right to an impartial jury] is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." (United States v. Dellinger, (7th Cir.

1972) 472 F.2d 340, 368, see also Nebraska Press Assn. v. Stuart, (1976) 427 U.S. 539, 602 [49 L.Ed. 2d 683, 722-723, 96 S.Ct. 2791] (conc. opn. of Brennan, J.); Swain v. Alabama, supra, 380 U.S. 202, 218-219 [13 L.Ed. 2d 759, 771]; United States v. Robinson, (D.C. Cir. 1973) 475 F.2d 376, 381; United States v. Lewis, (7th Cir. 1972) 467 F.2d 1132, 1138.) As the United States Supreme Court recently observed, "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges..." (Rosales-Lopez v. United States, (1981) 451 U.S. 182, [68 L.Ed.2d 22, 28, 101 S.Ct. 1629].) The high court in Rosales-Lopez reaffirmed Swain v. Alabama, supra, 380 U.S. at pp. 218-219 [13 L.Ed. 2d at p. 759], by recognizing the connection between voir dire and the exercise of peremptory challenges: "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories...."

Id. at 29 Cal.3d at 402-406, 628 P.2d at 873-876.

(b) The suppressed information indicated probable bias.

At times Petitioner appears to argue that a new trial is warranted only if the trial court finds actual bias. (Petitioner's Brief on the Merits at 31). At other times

Petitioner appears to concede that the right to peremptory challenge is impaired where the suppressed information is "indicative of an unfavorable attitude toward ... the complaining party" but not indicative of a bias so serious that a challenge for cause would have been granted. (Petitioner's Brief on the Merits at 19). Apparently then Petitioner agrees bias may be implied from a juror's suppression of information requested on voir dire.

As observed by Justice Stevens in Rosales-Lopez v. United States, 451 U.S. 182, 196, 68 L.Ed.2d 22, 101 S.Ct. 1629 (1981) (dissenting opinion), before any citizen may be permitted to sit in judgment, some inquiry into potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against an individual litigant that is unrelated to the particular case. Id. It is the former with which we are here concerned.

Just as it is common knowledge that many persons cannot, for whatever valid or

invalid reason, award money damages for pain and suffering, so too we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against negligence or product liability actions wherein injured persons are perceived as greedy.⁹

⁹ Although plaintiffs' personal injury trial attorneys are well aware of the existence of this attitude, especially in rural midwestern areas, it is difficult to show the Court its pervasiveness. Although few such cases reach the appellate courts because jurors holding such an attitude are normally excused for cause and error is not predicated thereon, some cases have been reported. In the following cases involving personal injury or wrongful death, it was held either that reversible error was committed in not excusing for cause jurors holding a bias against such actions, or that such jurors were properly excluded for cause: Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991 (1903), where two jurors "felt a prejudice against suits to recover damages for personal injuries, believing that many such were brought without merit, and that the number was constantly increasing" Id. at 992; Fitts v. Southern Pac. Co., 149 Cal. 310, 86 Pac. 710 (1906) juror held a prejudice against negligence actions; Slater v. United Traction Co., 172 App.Div. 404, 157 N.Y.S. 909 (1916) - juror held a prejudice against negligence actions; Moon v. Fickle, 3 App.Div.2d 802, 160 N.Y.S. 2d 387 (1957) - juror held a prejudice against negligence actions; Crawford v. Manning, 542 P.2d 1091 (Utah 1975) - new trial granted plaintiff where juror held a prejudice against negligence actions even though the juror stated she could render a verdict free of

Persons holding such an attitude generally view injured persons as seeking a reward for having an accident, rather than obtaining fair and just compensation for an injury suffered through the fault or in the use of a defective product of another. Such a bias is consistent with the attitude that "accidents are a part of life," or in other words, no one should get rich as a result of being in an accident. Such bias is as pervasive and as strongly held as a racial bias.

The trial judge observed that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this case (Joint Appendix, p. 89-90). Just the opposite is true. If no claim nor any in-

(Continuation of Footnote 9)

bias and prejudice; Abernathy v. Eline Oil Field Services, Inc., 650 P.2d 772 (Mont. 1982) - new trial granted plaintiff for manifest error by trial judge in failing to excuse for cause a juror who indicated she had negative feelings about suing to recover money for death of a child.

vestigation into the potential existence of a claim is made by the juror then this may very well be one of those persons who are biased against such claims. It is the attitude about claims and not the fact of injury that is the pertinent fact.

Under the undisputed facts in this case, jury foreman Payton failed to reveal a broken leg injury to his son as a result of a truck tire explosion, despite several opportunities in questioning by both counsel. Under the undisputed facts developed in the post-trial telephone interview, jury foreman Payton revealed not only a calloused concept of what constitutes a serious injury, but also a cavalier attitude toward making product-related claims.¹⁰ The Court of Appeals was certainly correct in holding the information suppressed by jury foreman Pay-

¹⁰ Petitioner entirely misperceives the significance of jury foreman Payton's undisputed post-trial comments when Petitioner assumes the comments are only indicative of Mr. Payton's attitude toward pain and suffering and his assessment of damages.

ton indicated his probable bias.

Such a decision involving implied bias is consistent with the decisions of this Court. The entire purpose of our jury system is to provide for fair and reliable determination of disputes between litigants. That purpose simply cannot be achieved if the jury's deliberations are tainted by bias and prejudice. Fairness and reliability are assured only if the verdict is based upon the evidence presented in the courtroom, and not upon sympathy, passion or prejudice. In a number of cases, this Court has made clear the right to trial by an impartial jury is the heart of due process.

Historically, the Court has not required a particularized showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party. Examples begin with cases involving jury selection procedures. The jury must be selected from a representative cross-section of the community; if selection procedures exclude


a significant portion of the community, thereby increasing the risk of bias, those procedures are invalid. In Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), the Court held that a defendant was denied his right to an impartial jury on the issue of sentence where veniremen having conscientious scruples against capital punishment were excluded. And in both Ballard v. United States, 329 U.S. 187, 91 L.Ed.181, 67 S.Ct. 261 (1946) and Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975), error was found in the exclusion of women from jury panels without a showing of prejudice in the individual case. Similarly, in Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972) the Court invalidated a selection procedure that resulted in the systematic exclusion of Negroes, finding it unnecessary that the defendant show actual harm or bias. This was so in Peters v. Kiff, supra, despite the fact the defendant challenging exclusion of blacks was white; in Taylor v. Louisiana, supra, the defendant

in Taylor v. Louisiana, supra, the defendant challenging the exclusion of women was male.

Neither has the Court required a specific showing of actual bias in cases involving pretrial publicity. In Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961), this Court unanimously reversed a conviction where extensive and unfavorable publicity had preceded the trial, even though the trial judge had personally examined members of the jury panel and each indicated he could render an impartial verdict.¹¹ And in Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963) the Court did not require a specific showing that a confession broadcast on television to the community actually prejudiced the jurors against defendant.

The Court has utilized an irrebuttable presumption of bias and prejudice even when the trial judge has questioned the jurors and

¹¹ Petitioner herein would no doubt complain that the Court in Irvin v. Dowd, supra, was wrong in making a "de novo determination" of each jurors' mental attitude.



found no prejudice. In Marshall v. United States, 360 U.S. 310, 3 L.Ed.2d 1250, 79 S.Ct. 1171 (1959), the Court reversed a conviction where some jurors had read newspaper articles containing information of a character which was so prejudicial it could not be directly offered as evidence; each juror had told the trial judge that he would not be influenced by the articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the defendant as a result of the articles. Similarly, in Leonard v. United States, 378 U.S. 544, 12 L.Ed.2d 1028, 84 S.Ct. 1696 (1964) (per curiam), the Court held that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.

Contact with the jury by third parties that might affect the jury's impartiality is presumptively prejudicial. In Turner v.

Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965) a conviction was reversed where during the trial the jury was in the care and custody of two deputy sheriffs who were two principal prosecution witnesses, even though the trial judge conducted a hearing and found that there was no evidence that either deputy had talked with any member of the jury about the case itself. The court said "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association..." Id. at 473. And in Remmer v. United States, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954), the Court ruled that any communication with a juror during a trial about the matter pending before the jury, "is, for obvious reasons, deemed presumptively prejudicial." Id. at 229. Though the presumption is not conclusive, "the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Ibid. After the hearing

on remand, the trial judge found that the juror was a "forthright and honest man," that the incident was "entirely harmless" and "did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any members of the jury." Remmer v. United States, 350 U.S. 377, 379, 100 L.Ed. 435, 76 S.Ct. 425 (1956). This Court again reversed, stating "neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror." Id., at 381. See also Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. denied 435 U.S. 924 (1978).

The Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased. In Ham v. South Carolina, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973) the Court held that a Negro defendant may not be denied the opportunity to question prospective jurors as to racial bias when the circumstances suggest the need for such questions. A generalized but thorough inquiry

into the impartiality of prospective jurors is still necessary even when questions about racial prejudice are not required. Ristaino v. Ross, 429 U.S. 589, 47 L.Ed.2d 258, 96 S.Ct. 1617 (1976).

In summary, the Court historically has not required a particular showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party; has regarded the absence of a balanced perspective in jury selection procedures as a recognizable form of prejudice, without requiring a specific showing of bias against the individual defendant; has conclusively presumed juror bias and prejudice even where the jurors involved denied it and a trial judge so ruled; has utilized a presumption of prejudice and placed the burden on the Government to overcome the presumption; and has insisted that criminal defendants be given a fair and meaningful opportunity in voir dire to determine whether prospective jurors are biased. Given that fairness and reliability of jury determinations are at stake, this is not too high a standard.

"The injury is not limited to the defendant - there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, supra, 329 U.S. at 195.

Respondent submits the Court of Appeals correctly ruled the information suppressed by jury foreman Payton indicated his probable bias.¹²

V. THE COURT OF APPEALS WAS CORRECT
IN NOT REMANDING THE CASE FOR A HEARING.

¹² Petitioner (at 28) advances the proposition that "bias alone" does not render a juror "incompetent;" that apparently a "perfectly fair" jury verdict can somehow be rendered by biased competent jurors. Quite a proposition from one who seeks to invoke due process - and clearly incorrect. "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155, 25 L.Ed. 244, ---S.Ct.---(1878). "If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." Reynolds, Id., at 157. Also see, Aldridge v. United States, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct. 470 (1931) - clearly recognizing that bias or prejudice is an element of the competency of a juror.

"Impairment of the right [of peremptory challenge] is reversible error without a showing of prejudice." Swain v. Alabama, supra, 380 U.S. at 219. Remand for a hearing to determine the probable or actual bias of jury foreman Payton is thus superfluous. Are we to have a hearing to ask jury foreman Payton if he harbored an "unacknowledged or unconscious bias?" See Darbin v. Nourse, supra, 664 F.2d at 1113.

Petitioner relies upon Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982) as requiring a hearing in this case. It does not because Smith, supra, did not involve the issue of impairment of the right of peremptory challenge.¹³ In Smith, supra, the Court declined to imply bias in cases of improper jury contact where a hearing on juror misconduct was held and no evidence of actual bias was revealed. In

¹³ Indeed, in Smith, supra, the defense had several unused peremptory challenges, Ibid., 455 U.S. at 212, n.4.

reaching its conclusion, the Court in Smith, supra, relied on Remmer v. United States, 347 U.S. 227, 98 L.Ed. 654, 78 S.Ct. 450 (1954), wherein a juror in a federal criminal trial was offered a bribe in exchange for a favorable verdict. The juror reported the incident to the trial judge who ordered an investigation after consulting with the prosecuting but not defense attorneys. The investigators concluded the purported bribe had been made in jest. After trial, defense counsel learned of the incident and filed a motion for a new trial, which was denied without a hearing. This Court reversed, stating:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of defendant, such contact with the juror was harmless to defendant. Id. at 229.

Smith, supra, and Remmer, supra, are certainly distinguishable from the instant case.

In Smith, supra, as in Remmer, supra, the allegation of juror partiality arose out of contact with third persons rather than a juror's suppression of information requested on voir dire. The issue of impairment of the important right of peremptory challenge was not and could not have been raised in Smith, supra, and Remmer, supra, because the facts of which the defendant complained occurred after the jury had been impaneled, i.e. after the point at which the defendant could have exercised a peremptory challenge. Smith, supra, does not require a hearing to determine the probable or actual bias of a juror who suppressed information on voir dire impairing Respondent's right of peremptory challenge. To do so would be to absolutely ignore the whole purpose of peremptory challenge, as so eloquently articulated by Justice White in Swain v. Alabama, supra.

Respondent submits this ends the inquiry. Proof of actual bias is simply wholly inconsistent with the concept of peremptory challenge. However, there are additional persuasive reasons not to require a hearing in this case.

As long ago as 1857, the Courts recognized it would take an individual of extraordinary character to own up to a bias:

[F]ew men will admit that they have not sufficient regard for truth and justice to act impartially in any manner, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations. People v. Gehr, 8 Cal. 359, 362 (1857).

Little psychological insight is needed to realize that a juror called to testify before a federal judge as to why he failed under oath to answer a question on voir dire would certainly downplay any significance in the act. Is there anyone so naive that expects such a juror to admit he lied under oath, to admit he concealed information for fear of counsel uncovering an actual or probable bias? Even assuming no evil purpose in the suppression of information, the juror may harbor a bias of which he himself is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome. As recognized by the Court in Irvin v. Dowd, supra, 366 U.S. at 727,

"The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

This Court has more specifically acknowledged the problem. In Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972), the Court invalidated jury selection procedures, stating the procedures were unacceptable even when there is no proof of actual bias. 407 U.S. at 504. (Marshall, J., joined by Douglas and Stewart J.J.). The opinion explained that actual bias is virtually impossible to prove. Ibid. Thus, it is necessary to "decide on principle which side shall suffer the consequences of unfavorable uncertainty." Ibid. Given the great potential for harm, and the importance of the right to an impartial jury, doubts must be resolved in favor of the litigant against whom bias is indicated.

Implied bias must be the rule in cases such as the one at bar not only because actual bias is virtually impossible to prove, but also because proof of actual or even probable

bias here is apparently prohibited by Rule 606(b), F.R. Evid. While misconduct relating to the motives or emotions influencing a juror may be as improper as more objective misconduct, proof of such subjective misconduct generally is prohibited by operation of rules concerning impeachment of verdicts. In this case, reversal for a hearing at which (presumably) the burden would be placed upon Respondent to prove actual or probable bias or jury foreman Payton through the mouth of jury foreman Payton would surely be a hollow and futile opportunity. There could be no answers given "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict ... or concerning his mental processes in connection therewith" Rule 606(b), F.R. Evid. A Catch-22 hearing will not protect Respondent's right to trial by an impartial jury, nor allow Respondent to show deprivation of his right of peremptory challenge.

It is for this very reason that courts have presumed prejudice. In United States v. Freeman, 634 F.2d 1267 (10th Cir. 1980), an F.B.I. investigator in the case who testified at trial was assigned to the jury room to operate a tape recorder for the jury; prejudice was presumed without inquiry because Rule 606(b) F.R. Evid. would make prejudice difficult to prove; a hearing was said to be "futile." Id. at 1269. However, see Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) cert. denied 435 U.S. 924, 55 L.Ed.2d 517, 98 S.Ct. 1488 (1978) where the Court said Rule 606(b), Fed.R.Evid. would not prohibit testimony as to outside influences occurring during the trial; but the Court did not remand for a hearing "considering the problem of fading memories and the natural reluctance of a juror to admit that he had been improperly influenced" Id. at 570, and concluded that "such a hearing would be pointless." Id. at 569.

Accordingly, the Court of Appeals was correct in not remanding the case for a hearing which

is at once superfluous and futile.

VI. UNDER NO CIRCUMSTANCES IS PETITIONER ENTITLED TO ENTRY OF TO UPON THE VERDICT OF THE JURY.

Respondent, without taking a cross appeal, may urge in support of a judgment any matter appearing in the record, although involving insistence upon matters overlooked or ignored by the Court of Appeals. Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153, reh. den. 398 U.S. 914, 26 L.Ed.2d 80, 90 S.Ct. 1684 (1970); Dayton Board of Education v. Briarman, 433 U.S. 406, 53 L.Ed.2d 851, 97 S.Ct. 2766 (1977). Respondent hereby urges in support of the judgment of the Court of Appeals granting Respondent a new trial, those 7 additional assignments of error in Brief of Appellant in the Court of Appeals.

If the judgment below is reversed, Respondent further urges as error the trial court's denial of Respondent's motions to approach the jurors (J.A. 67 and 86) and denial of leave to subpoena the jurors to give testimony at a hearing on Respondent's

motion for a new trial (J.A. 90 at 94), which Respondent also urged as error below. (Brief of Appellant, Issue 2).

If the judgment of the Court of Appeals not be affirmed, and if this Court determines it will not examine on certiorari Respondent's 7 additional assignments of error, then it would only be appropriate to remand the case to the Court of Appeals. Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 91 L.Ed. 1024, 67 S.Ct. 798 (1946). In no event is Petitioner entitled to entry of judgment upon the verdict of the jury.

CONCLUSION

The judgment of the United States Court of Appeals granting Respondent a new trial must be affirmed.

Respectfully submitted,

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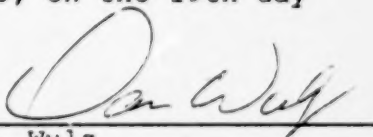
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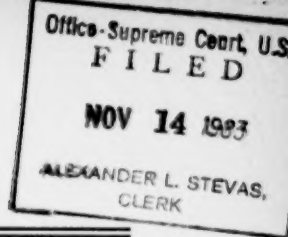
CERTIFICATE OF SERVICE

I, Dan L. Wulz, in compliance with Rule 28.3 and 28.5 of this Court, hereby certify that all parties required to be served have been served by my causing hand delivery of three copies of the above and foregoing Brief of Respondents on the Merits at the office of counsel for Petitioner, Donald Patterson, 400 First National Bank Building, Topeka, Kansas 66603, on the 19th day of September, 1983.



Dan L. Wulz

No. 82-958



In The
Supreme Court of the United States
October Term, 1983

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FRED A. GREENWOOD, JOHN G. GREENWOOD, individually; and FRED A. GREENWOOD, individually,

Respondents.

REPLY BRIEF OF PETITIONER

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BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FRED A GREENWOOD, JOHN G. GREENWOOD, individually; and FRED A GREENWOOD, individually,

Respondents.

REPLY BRIEF OF PETITIONER

ARGUMENTS AND AUTHORITIES

- I. Petitioner's constitutional rights to due process and trial by jury are within the scope of review on certiorari.

Respondents' brief suggests that this Court should ignore the constitutionality *vel non* of the decision of the U. S. Court of Appeals for the Tenth Circuit in this mat-

ter, for the stated reason that constitutional issues were not raised before the Court of Appeals or in the Petition for Certiorari. A review of the record contradicts the assertions of Respondents.

The constitutionality of the rule of law followed in the Tenth Circuit in analyzing questions of alleged juror misconduct during voir dire was not at issue in this case until the opinion of the Court of Appeals was issued on September 3, 1982. Prior to that date no indication had been given that the Court of Appeals would ignore facts appearing in the record or would resort to an irrebuttable presumption, rather than utilizing a rule of reasonable inference based upon all material evidence. Petitioner's response to the opinion of the Court of Appeals was a petition for rehearing focusing upon the arbitrariness and irrationality of the decision rendered by the Court of Appeals. The Petition for Rehearing therefore gave the Court of Appeals an opportunity to assess the constitutional issues raised by its decision, by way of a rehearing. The Petition for Rehearing was of course denied with one dissenting vote on October 4, 1982.

Constitutional issues were directly addressed in the Petition for Certiorari, contrary to the implication of Respondents' brief. Petitioner's contentions concerning the unconstitutionality of the decision rendered by the Court of Appeals were summarized in the Petition for Certiorari at pages 8-9:

Only the Supreme Court of the United States can maintain discipline over the various Circuit Courts of Appeal. Where a Circuit Court of Appeals oversteps its authority, and usurps the authority of the district court rather than exercising review over that

court, this Court is required to exercise its powers of supervision. The decision rendered by the Court of Appeals in this Court is without parallel in any other reported decision. *The defendant was entitled to a trial by jury under the provisions of the Seventh Amendment to the United States Constitution.* If the Courts of Appeal are permitted to grant arbitrary indulgences to selected appellants, outside the boundaries of accepted principles of appellate review, jury verdicts will be rendered meaningless. The opportunity for abuse of discretion is vast. If a Court of Appeals were permitted to grant new trials on behalf of favorite appellants without regard to principles of law, and to deny new trials where the verdict favors the party in sympathy, the legal process would be reduced to a game of chance. (Emphasis supplied.)

Respondents' contention on page 23 of his brief on the merits that this issue was not addressed in the Petition for Certiorari therefore results from a failure to read that document.

II. The decision of the Court of Appeals was not based upon stipulated facts.

Respondents' brief continually refers to the facts found by the Court of Appeals as having been "stipulated". There is no evidence anywhere in the record that the facts on which the Court of Appeals based its decision were other than controverted. The findings of the Court of Appeals relate to the materiality of certain comments made by juror Payton, not to the mere fact of Payton's having spoken the described words. The entire conversation, not simply a phrase taken out of context, must form the basis for any factual determination of materiality. The Court of Appeals ignored the most significant portions of the conversation as reported by counsel for

Petitioner, apparently because counsel for Respondents denied that these comments had been made. A factual controversy therefore underlies all of the issues presented on certiorari.

The factual controversy is set out on page 9 of the reply brief of appellant before the Tenth Circuit:

On page 18 of its brief, defendant states:

Although it is not in the record, defense counsel does recall the conference telephone call with plaintiff's counsel and the juror Payton. Payton did indeed relate the fact that his son received a broken leg late in the summer as the result of an exploding tire rim. His son recovered from the injury in about a month and in time to play for his high school football team in the fall following the late summer in which the accident occurred. He did not regard it as a "severe" injury and as he understood the question did not result in any "disability or prolonged pain and suffering". As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent. No misconduct surfaced.

This entire problem is amplified and complicated by the fact the trial court refused plaintiff leave to go out to interview jury foreman Payton (where a court reporter could have been present) and denied plaintiff leave to subpoena the jurors to give testimony at the hearing on plaintiff's Motion for a New Trial. Both plaintiff and defendant's counsel are forced to rely upon memory of a brief conversation which took place one and one half years ago. Contrary to defendant's recollection, counsel for plaintiff does not recall that any questions were asked or answers given concerning the description or number of broken bones, that any questions were asked or answers given concerning any return to playing football, and that any questions were asked or answers given concerning

whether jury foreman Payton regarded the injury as severe or resulted in any disability or prolonged pain and suffering. Counsel for plaintiff felt very constrained by the limited scope of inquiry allowed by the trial court, and the conversation only lasted about two minutes. The conclusion that jury foreman Payton answered counsel's questions honestly and correctly, and that no misconduct surfaced, is that of defendant. What is important about the telephone conference, which was stated in Brief of Appellant, (page 7), and adopted by defendant (Brief of Appellee, page 128), is the attitude of jury foreman Payton that accidents are a part of life and that all his children had been involved in accidents. Mr. Payton's basic stand was that the voir dire questions were dumb questions and made no difference *to him*. However, revelation of jury foreman Payton's attitude would have made a difference to counsel when exercising plaintiff's right of peremptory challenge.

The comments by Respondents' counsel in the above quoted text are highly revealing. Opposing counsel's recollection of the conversation was that it addressed questions outside the scope of the inquiry permitted by the District Court. The permission granted by the trial Judge was specifically limited to a determination of the severity of the injury in question, and whether that injury resulted in disability or prolonged pain and suffering. Counsel for Respondents apparently willfully violated that order by failing to inquire upon that subject, and instead inquiring about the juror's general attitude toward personal injury claims without relation to his son's injury.

This factual controversy also points out the lack of foundation for the Court of Appeals' determination of "materiality". Based on the information presented to the Court of Appeals, it is impossible to determine whether

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the fracture in question was hairline or compound, whether it involved hospitalization, or even whether a cast was applied. The comments made by juror Payton, as recalled by counsel for Petitioner, were strongly indicative that the injury was not severe enough to be brought to mind by the questions asked of juror Payton.

According to the arguments set out in Respondents' brief, the materiality of any information revealed by a prospective juror can only be made in context with other answers on the same topic. The fact of injury alone is not indicative of bias for or against either party. According to Respondents' brief, an attitude of complete stoicism or resignation in the face of a crippling injury would be indicative of anti-plaintiff bias while an unwillingness to file a lawsuit over a minor injury would not so indicate. Presumably this was the thought process followed by counsel in response to the revelations of juror Finnigan. That juror indicated that her husband had been involved in a work place accident in which a machine "stripped the back of his hand off". She described the failure to file suit over this incident by saying that the accident "didn't have anything to do with the machine, it was a human error of somebody else". Presumably this sort of attitude is what counsel for Respondents have in mind when they describe the process of exercising peremptory challenges.

Assuming that this is the process ordinarily followed, that process obviously was ignored in the present case. Mrs. Finnigan uttered a classic "bellringer" to use the language of Respondents, and uttered highly pro-defendant comments during follow up questioning, yet Mrs. Fin-

nigan remained on the jury. There can be no conceivable clearer proof that the attitude of jurors toward injuries to members of their families was considered to be immaterial by all parties. The conduct of counsel in response to the so-called "revelations" of juror Payton also speaks louder than any ex post facto rationalization. If the information revealed by juror Payton in his post trial interview had been considered significant by counsel for Respondents that information would have been reported to the District Court before whom the motion for a new trial was pending.

In summary the so-called "stipulated" facts are meaningless in and of themselves. An intelligent appreciation of the significance of those facts requires resort to the record in its entirety, and the remainder of the telephone conversation in which these "revelations" were made. Because counsel for Respondents controverted the full description of the post trial conversation, and because the Court of Appeals ignored all facts in or out of the record other than those favoring Respondents' position in determining materiality, unresolved questions of fact existed.

III. The "right to know" analysis followed by the Tenth Circuit and favored by respondent is unconstitutional and unworkable.

Respondents' brief on the merits supports the position of the Tenth Circuit Court of Appeals concerning the irrelevancy of any determination of actual bias, where a litigant claims to have been deprived of the right to exercise peremptory challenges. Respondents suggests that actual bias and good faith should be ignored, in favor of an abstract analysis of the information that could have been

obtained during some hypothetical voir dire examination. The position of Respondent ignores the most elementary principles of due process and exalts formalities over facts. The analysis of Respondent expressly rejects the harmless error rule of F.R.C.P. 61 and 28 U.S.C. Section 2111.

Respondent's analysis rests upon the contention that there exists some abstract "right to know" what goes on inside the mind of a jury panelist. This "right to know" is described in terms which conveniently ignore the issue of "how to find" this elusive information. Opposing counsel admit that the information sought is evidence of *unconscious* or *unacknowledged* bias. It is even suggested that interrogation of the suspect juror on remand would be fruitless, since a biased juror would not reveal his or her attitude during interrogation. This argument of course proves too much. If the mental state which counsel seeks to discover cannot be revealed during examination under oath, how then is it to be discovered? Perhaps a resort to supernatural practices is to be suggested?

The contention that "unconscious bias" warrants a presumption of error in cases such as this has been rejected by this Court and by all circuits other than the Tenth. Only last year in *Smith v. Phillips*, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982), the efficacy of post trial examination of potentially biased jurors was acknowledged:

We may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter. 455 U.S. at 217, Footnote 7.

An honest and truthful juror can reveal as much in a post trial hearing as he possibly could reveal during voir dire examination. Thus there should be no difficulty in presenting on remand a full and complete picture of everything that juror Payton could have revealed during voir dire examination.

Respondents contend that the difficulty of proving unconscious bias through examination of jurors warrants the imposition of a presumption in favor of the party seeking a new trial on that basis. This is admittedly the rational conclusion to be drawn once a "right to know" is established. The significance of the argument is that it disproves the premise, not that it supports the conclusion that presumptive bias should be inferred. Because the harmless error rule prohibits a presumption of reversible error, the premise of an abstract right to know must be rejected.

28 U. S. C. Section 1870 does not guarantee knowledge to counsel for litigants. It guarantees the right to exercise peremptory challenges. These challenges are to be exercised on the basis of whatever information counsel possesses. The Court may, in its discretion, grant counsel the right to inquire before peremptory challenges are exercised under F.R.C.P. 47. Counsel does not have a right to know, or even a right to inquire, but only a right to hear the responses made during voir dire examination. If the information which counsel desires to know is, by definition, the presence or absence of an unconscious or unacknowledged bias, that information simply cannot be revealed during the jury selection process. All that can be obtained from the jury panel during voir dire are honest,

good faith answers to voir dire questions as the panel members understand those questions.

It is one thing to assert a right to rely upon the honesty of the answers given during voir dire. It is a wholly different matter to allege a right to know things that a prospective juror is incapable of stating. If some objective fact about the panel member is indicative of bias, but is unknown to him or her, that information must be learned outside the courtroom. If such information is available, it is available before the exercise of peremptory challenges, and not solely after the rendition of an adverse verdict. Certainly the judicial system cannot guarantee to litigants information which is inaccessible to the trial participants.

The meaninglessness of a so-called "right to know" is best illustrated by inquiring of the method by which the District Court in this case would guarantee such a right, if Respondents are successful in obtaining a new trial. Is voir dire to be conducted in some different manner? Are jurors to be subjected to polygraph examination? Are the services of private investigators to be utilized by the parties? No matter what procedure is used, the only information that can be obtained *from the jury panel* will be honest good faith answers to those questions which are in fact asked.

Neither opposing counsel nor the Court of Appeals contended that juror Payton's answer to the question actually asked of him was material in and of itself. Payton was asked only to reveal whether any member of his family had suffered a disabling injury, or an injury that resulted in prolonged pain and suffering. All parties acknowledged that a "yes" answer to that question is not in

and of itself material. Jurors Cook and Finnigan both answered the question in the affirmative, and no suggestion has been made that their answers were material to the exercise of peremptory challenges. The information which counsel claims to have required was the answer to another, wholly different question asked during a post trial telephone conversation. The substance of that question has been lost forever due to lapse of memory. This question was undoubtedly one which could have been asked by counsel before exercising peremptory challenges, but was not.

The so-called "right to know" espoused by Respondents and the Tenth Circuit amounts simply to this: unsuccessful litigants are to be given the opportunity to show that voir dire examination could have been conducted more thoroughly, and that some additional information which might conceivably have been significant to counsel would have been elicited, if a more thorough voir dire examination had been conducted. Where counsel for the unsuccessful litigant can show that his voir dire examination was inadequate, his client is guaranteed a new trial. Under this rule intelligent counsel would ask only a single question. The jury panel would be requested to volunteer all information which might conceivably be pertinent to an assessment of their possible unconscious bias. Any information not volunteered by a jury panelist could then be discovered post trial through ordinary voir dire. This procedure of course makes a mockery of the jury trial system, but it does uphold the contended "right to know".

Counsel knew everything that he was entitled to know when peremptory challenges were exercised. Counsel knew the honest good faith answers of every member of the jury panel. If additional information was not revealed, it was

solely due to counsel's failure to inquire. Juror Payton was prepared to reveal during voir dire everything which he revealed during the post trial interview. Assuming that the information revealed in that interview was material, it was available for the asking during the jury selection process. The only fact about juror Payton learned from some source other than Payton himself was the fact of his son's injury. Even this fact was readily admitted by him when he was asked a simple question. This "unrevealed" fact is admitted by all parties to be immaterial in and of itself. Its significance lies solely in its tendency to invite further inquiry. As described in great detail in Petitioner's brief on the merits, counsel for Respondents was already on notice that further inquiry was needed on the topic of juror Payton's attitude toward personal injury, pain, and suffering due to his long time employment in a slaughter house.

The "right to know" can mean nothing more than a right to inquire. Counsel was not deprived of his right to inquire. Even the Court of Appeals acknowledged that counsel received all of the information which could be provided through a good faith response to inquiry. Supposition of a right to know more than can be revealed during this process implies an unwarranted and unworkable privilege to attack otherwise proper and fair jury verdicts during post trial proceedings.

IV. Respondents' suggestion that the case be remanded to the Court of Appeals should be rejected.

A review of Respondents' brief on the merits indicates no suggestion or hint that the question of juror misconduct should be submitted in a hearing wherein both parties have

an opportunity to present evidence and argument. Respondents are plainly upset at the suggestion that the District Court be allowed to find any facts in this case, and appear to be similarly displeased by a suggestion that a factual determination be made on the basis of all of the evidence currently in the record, even if that were to include all information suggested to the Court of Appeals. Respondent would have this Court affirm the decision of the Court of Appeals and thereby affirm that Court's denial of a right to a hearing, or remand this case to the Court of Appeals for a rehearing on issues other than juror misconduct, but in no event for a determination of the juror misconduct issue on the basis of a full hearing.

If there really were any merit to Respondents' position, there would not be so much hesitation to permit juror Payton to speak his mind fully and openly on the record. Respondents are pleased to be able to complain that such a hearing did not take place, but openly prefer that any information which might be obtained during such a hearing be ignored. Respondents' position on the question of remand can therefore only be construed to support Petitioner's contention that no facts exist to form the basis for a new trial.

None of the other circuit courts of appeal have any difficulty in assessing the merits of a complaint about irregular jury selection procedures by way of an evidentiary hearing. Every other circuit provides both litigants an opportunity to present facts and argument before the tribunal which is most familiar with the nature of the case and the issues presented. The Tenth Circuit Court of Appeals openly espouses a different substantive rule from that followed in other circuits, by reducing the issues of

bias and prejudice to the concept of "materiality". Under any rule the Court's determination that a substantial right has been impaired must be based upon facts rather than upon speculation. If any fact is material to that determination, Petitioner was entitled to a hearing on that subject. If there were no facts to be determined, then the rule followed by the Tenth Circuit must by definition be arbitrary and capricious.

No hearing is in fact required because the burden of proof was on Respondents to submit facts and arguments supporting a contention that the District Court abused its discretion in denying a new trial. While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the results set aside, and that it be sustained not as a matter of speculation but as demonstrable reality". See *Beck v. Washington*, 369 U. S. 541, 558, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). No facts were presented either at the District Court level or to the Court of Appeals to support a contention of bias. Because those supportive facts do not appear in the record, Petitioner is entitled to an affirmance of the judgment in its favor. If the unsupported contentions presented to the Tenth Circuit are deemed by this Court to have raised a factual inference, the only proper course of conduct is that followed in every other circuit. The case should be remanded to the District Court for a full fact hearing and a determination of either "materiality" or bias and prejudice as the case may be.

There is no need to consider any issue presented to the Court of Appeals but rejected by that Court. In the

last two pages of their brief on the merits Respondents suggest that this case should be remanded to the Court of Appeals to permit the redrafting of that Court's opinion. It is suggested that the Tenth Circuit should achieve its goal of arbitrarily granting a new trial by issuing an opinion with less impeachable rationalizations. If there had been any merit to the other issues presented to the Court of Appeals, the Court of Appeals would have commented upon them. The other issues involved alleged errors which were subject to repetition upon retrial. If these issues had been considered meritorious the District Court undoubtedly would have been given instructions to revise its rulings upon retrial. Since no instructions were given to the District Court concerning the alleged trial errors, it can only be presumed that these issues were found by the Court of Appeals to lack merit.

This is not a case where a significant issue has been raised for the first time on certiorari, or where the Court of Appeals has failed to consider significant issues due to an erroneous resolution of the questions presented on certiorari. The case of *Aetna Casualty and Surety Co. v. Flowers*, 330 U. S. 464, 91 L. Ed. 1024, 67 S. Ct. 798 (1946), is therefore inapposite. The additional grounds for the granting of a new trial presented to the Court of Appeals can be resolved by this Court on the record before it without remand.

V. CONCLUSION

For all of the above stated reasons the judgment of the U. S. Court of Appeals for the Tenth Circuit should

be reversed, and judgment should be entered in favor of Petitioner. No remand is necessary because the burden of proof placed on Respondents to adduce evidence of juror misconduct resulting in prejudice to a substantial right has not been met. If the unrecorded comments related to the Court of Appeals are held to form a sufficient basis to raise an inference of bias or prejudice, Petitioner is entitled to a remand for a full factual hearing before the District Court on those questions. Any remand should be to the District Court for factual findings relating to alleged juror misconduct. Under no circumstances would a remand to the Court of Appeals for reconsideration of issues previously rejected by that Court be proper.

Respectfully submitted,

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NO. 82-958

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ROBERT L. STEVENS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

v.

BILLY G. GREENWOOD, a minor child, by his parents
and natural guardians, JOHN G. GREENWOOD and
FREDA GREENWOOD; JOHN G. GREENWOOD, individually;
and FREDA GREENWOOD, individually,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
For The Tenth Circuit*

**BRIEF OF AMICUS CURIAE
SOUTHERN UNION COMPANY**

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IN THE
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McDONOUGH POWER EQUIPMENT, INC.,
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v.

BILLY G. GREENWOOD, a minor child, by his parents
and natural guardians, JOHN G. GREENWOOD and
FREDA GREENWOOD; JOHN G. GREENWOOD, individually;
and FREDA GREENWOOD, individually,
Respondents.

*On Writ of Certiorari to the
United States Court of Appeals
For The Tenth Circuit*

**BRIEF OF AMICUS CURIAE
SOUTHERN UNION COMPANY**

Southern Union Company and Southern Union Gathering Company, having obtained and filed the written consent of Petitioner McDonough Power Equipment, Inc., and Respondents Billy G. Greenwood, et al., file this *Amicus Curiae* Brief in Support of Respondent Billy G. Greenwood, et al.

I. STATEMENT OF INTEREST

Southern Union Company and Southern Union Gathering Company (collectively "Southern Union") are defendants in several consolidated actions currently pending in the District of Colorado styled *In re New Mexico Natural Gas*

Antitrust Litigation, MDL Dkt. No. 403. Southern Union Company operates as a regulated natural gas utility in New Mexico. The gravamen of the complaints in MDL 403 is that Southern Union and several natural gas producers allegedly engaged in a conspiracy to fix the price of intra-state natural gas in the San Juan Basin of New Mexico, in violation of Section 1 of the Sherman Act. Plaintiffs seek damages in excess of \$600 million.

One of the actions, *Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578-HB, was brought on behalf of all residential gas customers of Southern Union Company in New Mexico. The certified class is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." Because many potential jurors were either class members or closely related to class members, the trial court and counsel made extraordinary efforts to ensure that neither group served as jurors.

On March 26, 1982, a jury returned a liability verdict against Southern Union. Following the trial, it was determined that one member of the jury had three children who were members of the plaintiff class in the *Brewer* case. The juror had falsely stated in a pretrial questionnaire that none of his relatives were Southern Union customers, and declined an opportunity during voir dire to change his answer. Under the district court's rulings, had the juror made proper disclosure he would have been automatically excused for cause.

On January 17, 1983, the district court, relying on the Tenth Circuit opinions in *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982); *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964); and *Consolidated Gas and Equipment Co. of America v. Carver*, 257 F.2d 111 (10th Cir. 1958), held that the juror's failure to

disclose that his children were customers of Southern Union had deprived the defendants of their right to exercise a peremptory challenge and therefore ordered a new trial. (A copy of the unpublished opinion is attached as Appendix I). The case was subsequently transferred to the District of Colorado pursuant to 28 U.S.C. § 1404(a).

This Court's disposition of the *Greenwood* case may directly affect Southern Union's interests in MDL 403. Accordingly, Southern Union files this *amicus curiae* brief.

II. SUMMARY OF ARGUMENT

The Constitution guarantees not only the right to trial by jury but also the right to a fair and impartial jury. This Court has long recognized the critical role which the right of peremptory challenge, secured to civil litigants by statute, plays in securing the Constitutional right to a fair and impartial jury. Denial of the peremptory challenge right is clearly grounds for new trial in both civil and criminal cases. Peremptory challenges are important because they allow counsel to excuse from the jury those whom he suspects of bias even though the suspected bias might not constitute grounds sufficient to sustain a challenge for cause.

The Courts of Appeals have recognized that the right of peremptory challenge is ineffective unless counsel has sufficient information to allow him to exercise the challenge intelligently. They have granted new trials where the trial court refused to ask questions which would have allowed counsel to exercise his peremptory challenge rights intelligently. Acquiring sufficient information requires, however, not only that court and counsel direct appropriate inquiry to potential jurors, but also that potential jurors answer accurately the questions posed. A party is just as effectively denied the right by a juror's failure to answer a question as it is by the judge's failure to ask it.

Recognizing that the effective exercise of the right of peremptory challenge depends upon a juror's supplying accurate information in response to voir dire questions, the Tenth Circuit held in this case that where a juror fails to disclose information during voir dire, and the non-disclosed information is of "sufficient cogency and significance to cause [the court] to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge," a party is entitled to a new trial. The rule logically follows from the premise, unchallenged in any circuit, that the exercise of the right to peremptory challenge depends upon counsel's receiving accurate information.

Peremptory challenges are designed to eliminate from the jury those whom counsel suspects of bias but whose suspected bias may not justify a challenge for cause. If bias which would justify a challenge for cause were demonstrable at voir dire, no peremptory challenge would be needed.

Of course, not every nondisclosed fact during voir dire examination should lead to a new trial, nor should a new trial be granted where the question was ambiguous or unclear so that the juror was not put on notice of his duty to respond. However, where the question is plainly put and where the nondisclosed information is material to the possibility of a predetermined attitude against a party or regarding some important issue in the case, then counsel is clearly entitled to know of such information, even if the information would not have resulted in a challenge for cause. Without such information, counsel cannot exercise the peremptory challenge effectively.

Determining whether the right to a peremptory challenge has been denied requires only a factual record sufficient to demonstrate whether material information has gone undisclosed; a hearing is not necessarily required if the facts are undisputed. While a trial court should only act where it

has a sufficient factual basis for determining that the right to exercise a peremptory challenge has been denied, there is no compelling reason why those facts, if not subject to genuine dispute, must be adduced at a hearing. Indeed there are cogent reasons why a hearing should not be required: *e.g.* the spectre of citizens being called to court and interrogated may have a "chilling effect" on their willingness to serve as jurors. Since the prejudice results from the failure to disclose pertinent information, the only relevant issues are whether the information was not disclosed and whether the information is sufficiently indicative of possible bias.

III. DISCUSSION

A. Peremptory Challenges are Essential to Obtaining A Fair Trial.

Although the Constitution specifies neither procedures for obtaining an impartial jury nor tests for determining juror partiality, *United States v. Wood*, 299 U.S. 123 (1936), voir dire examination has developed as the principal mechanism for ferreting out jurors who are disqualified or who may be biased:

The very purpose of voir dire examination is to develop the whole truth concerning the prospective juror's state of mind, not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective juror's suspected bias or prejudice.

Photostat Corp. v. Ball, 338 F.2d at 786.

Both the federal rules of civil and criminal procedure grant trial judges broad discretion in conducting voir dire.¹ But that discretion is not unfettered. The trial court has a serious duty to determine questions of potential juror bias. *Dennis v. United States*, 339 U.S. 162, 168 (1950). This Court has reversed criminal convictions where the trial judge failed to allow voir dire aimed at disclosing serious prejudice. *Ham v. South Carolina*, 409 U.S. 524 (1973) (failure of trial judge to inquire about racial prejudice was denial of due process); *Aldridge v. United States*, 283 U.S. 308 (1931) (failure of trial judge to allow counsel to inquire about racial prejudice was reversible error). These cases are clearly premised on the notion that litigants are entitled to information indicative of bias or prejudice when challenging jurors.

Although not specifically guaranteed by the Constitution, the right of peremptory challenge is statutorily granted in civil cases² and is a necessary part of trial by jury. *Lewis v. United States*, 146 U.S. 1011 (1892). In *Swain v. Alabama*, 380 U.S. 202 (1965), this Court outlined the importance of the peremptory challenge:

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re*

¹ Fed. R. Civ. P. 47 provides in part: "The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination." Fed. R. Crim. P. 24(a) authorizes the same procedure in criminal cases.

² 28 U.S.C. § 1870 states: "In civil cases, each party shall be entitled to three peremptory challenges."

Murchison, 349 US 133, 136 (1955). Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause . . .

While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. *Hayes v. Missouri*, 120 U.S. 68 (1887).

380 U.S. at 220. Thus the peremptory challenge is essential to obtaining a fair trial.

B. Impairment of the Right of Peremptory Challenge Requires a New Trial.

The right of peremptory challenge is "an arbitrary capricious right and it must be exercised with full freedom or it fails of its full purpose." *Lewis v. United States*, 146 U.S. at 1014. The denial or impairment of the right is reversible error without a showing of prejudice. *Swain v. Alabama*, 380 U.S. 202 (1965). A party need not show that a biased juror served on the jury to establish denial of the right to exercise a peremptory challenge. Moreover, where the right to exercise a peremptory challenge has been denied, a party is entitled to a new trial irrespective of how the right was denied. *Carr v. Watts*, 597 F.2d 830 (2d Cir. 1979) (right was denied where judge forced plaintiff to exercise all peremptory challenges before replacement jurors seated); *United States v. Turner*, 558 F.2d 535 (9th Cir. 1977) (right was denied where judge forced a defendant to forego a peremptory challenge each time he accepted the panel as then constituted). Courts have also held that the right is denied where the judge forces a party to exercise a peremp-

tory challenge on a person properly challengeable for cause. *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977); *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976).

Unlike the challenge for cause, which is determined by the trial court, the peremptory challenge permits trial counsel unfettered discretion to challenge jurors on behalf of his client. The Courts of Appeals have recognized that for the right to be effective, sufficient information must be elicited during voir dire to allow counsel to exercise the right intelligently. In *Kiernan v. Van Schaik*, 347 F.2d 775 (3d Cir. 1965), the trial court, in accordance with local custom, had asked only a few perfunctory questions designed to ascertain obvious disqualification. The Third Circuit reversed, stating:

In following a local custom which forbids voir dire examination in aid of peremptory challenge . . . the court below deprived plaintiff of a necessary and important right.

347 F.2d at 779.

In *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977), the Fourth Circuit reversed a conviction where the trial court refused to ask sufficient questions to allow counsel to exercise his peremptory challenges intelligently. After noting the importance which this Court has accorded the right to exercise peremptory challenges, the Court of Appeals stated:

Of course, this purpose would largely be vitiated if peremptory challenges were required to be exercised without the benefit of adequate information upon which rational challenges may be predicated, irrespective of whether such information is actually utilized, or whether the crucial factor to a particular defendant is "those with

blue eyes." While it is the nature of a peremptory challenge that it may be exercised capriciously or whimsically, at least the opportunity to exercise it meaningfully must be present. Thus, the adequacy of the court's voir dire examination becomes inevitably bound up with the defendant's opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause. If probing questions are never asked . . . salient information about prospective jurors might never be revealed, and the entire process would do nothing to advance the cause of selecting a competent, disinterested jury . . . A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice.

557 F.2d at 1048, 1049. *See also United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979) (trial court's refusal to ask prospective jurors whether they would give greater or lesser weight to testimony of law enforcement officer or whether they were acquainted with witnesses denied right to peremptory challenge); *United States v. Dellinger*, 472 F.2d 340, 366-77 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Thus, a party clearly has a right to a voir dire examination sufficient to allow the meaningful exercise of its right to peremptory challenge.

If a trial judge has a duty to conduct voir dire examination to allow a litigant to exercise his peremptory challenge right intelligently, the right would be completely vitiated if no duty is imposed upon a venireman to answer accurately the questions posed by the judge or counsel. The right to peremptory challenge is just as effectively denied by a venireman's failure to answer accurately a question as by a judge's failure to ask it. Both deny a litigant information essential to the effective exercise of the peremptory challenge. If the right recognized by this

Court and granted by Congress is essential to a trial by jury, and if its effective exercise depends upon acquiring adequate information, some remedy must be available for a juror's failure, upon adequate questioning, to provide a party with that information.

In recognition of these facts the Tenth Circuit holds that where a juror fails to disclose information "of sufficient cogency and significance" to cause the court to believe that counsel was entitled to know of it in exercising a peremptory challenge, the party is entitled to a new trial. This rule, embodied in *Greenwood*, *Photostat*, and *Carver*, sensibly focuses upon the factor deemed crucial to exercising the challenge, *i.e.*, the information of which counsel was deprived. If a judge's failure to ask adequate questions is to be remedied by a new trial, then the same consequence should follow from a juror's nondisclosure of material information which he is asked to reveal.

Other circuits also grant new trials where a juror does not disclose material information. For example, the Sixth Circuit holds that a party has been deprived of its right to exercise a peremptory challenge where the juror either deliberately conceals information or the non-disclosed information would have led to a challenge for cause. *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981). The Fourth Circuit holds that where a juror deliberately conceals information and that information indicates "possible bias" then the right to exercise a peremptory challenge has been denied. If the non-disclosure was not intentional, then the moving party must show either actual bias or circumstances under which bias will be presumed. *See United States v. Bynum*, 634 F.2d 768 (4th Cir. 1980); *Fallaw v. Michelin Tire Corp.*, No. 81-1812 (4th Cir. May 20, 1982) (unpublished opinion attached as Appendix II). Thus, other Courts of Appeals hold that under certain circum-

stances a juror's failure to disclose important information during voir dire deprives a party of its right to exercise a peremptory challenge, thereby entitling it to a new trial.

Petitioner asserts that presumptions of bias are no longer favored by this Court and that a presumption of bias in the context of the exercise of peremptory challenges makes no sense. Petitioner's Brief on the Merits at 25. However, with respect to challenges for cause, presumptions of juror bias are clearly appropriate. The law has long recognized that the existence of some relationships creates a conclusive and irrebuttable presumption of bias. In those circumstances, bias will be imputed from mere proof of the existence of the relationship, and proof of the actual existence of bias need not be shown. *United States v. Wood*, 299 U.S. 123, 133 (1936). Many jurisdictions have statutes which identify relationships which automatically disqualify prospective jurors, without regard to actual bias. *See, e.g.*, Okla. Stat. tit. 20, § 660; Cal. Penal Code § 1074 (West 1970); N.Y. Civ. Prac. Law § 4110 (McKinney 1963). In other jurisdictions, such formulations are based on common law. *See, e.g.*, *State v. West*, 157 W. Va. 209, 210, 200 S.E.2d 859, 865 (1973); *State v. Kokoszka*, 123 Conn. 161, 163, 193 A. 210, 211 (1937). If a relationship from which the court can imply bias as a matter of law is established after trial, and the party exercised diligence in ascertaining the ground for disqualification during voir dire, the moving party must be granted a new trial. *Johnston v. State*, 239 Ind. 77, 155 N.E.2d 129 (1958) (new trial granted where juror failed to disclose that she was second cousin of victim); *Crawley v. State*, 103 S.E. 238 (Ga. 1921); *Darraugh v. Denny*, 245 S.W. 152 (Ky. Ct. App. 1922) (new trial granted where jurors were second and third cousins to defendant).

In the absence of statutory guidance concerning relationships deemed to be disqualifying as a matter of law, the federal courts have followed the common law rule. This Court first adopted it in *Crawford v. United States*, 212 U.S. 183 (1909). In *Crawford*, petitioner appealed from a conviction for conspiring to defraud the United States. He assigned as error the trial court's denial of his challenge for cause to a juror who was a federal employee. In reversing the trial court's denial of a motion for a new trial, the Court stated:

A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject.

212 U.S. at 195. The Court then noted the common law maxim that one is not a competent juror in a case if he is a master, servant, steward, counselor, or attorney of either party. "In such a case a juror may be challenged for principal cause as an *absolute disqualification of the juror*." 212 U.S. at 195 (emphasis supplied). The Court went on to explain the rationale of the rule:

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore

most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

212 U.S. at 196.

In 1935 Congress enacted D.C. Code § 11-1420 (1940), removing the disqualification, which arose as a result of the *Crawford* decision, of government employees in criminal cases and other cases where the government was a party. Although the Court has since upheld the statute in three separate challenges, in each case it has reaffirmed the principle that in some circumstances a court can imply bias on the basis of a juror's relationship to a party. See *United States v. Wood*, 299 U.S. at 133; *Frazier v. United States*, 335 U.S. 497 (1949); *Dennis v. United States*, 339 U.S. at 171; see also *United States v. Burr*, 25 F. Cas. 49, 50 (C.C. Va. 1807) (Marshall, C. J.) (a person "may declare he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice because, in general, persons in a similar situation would feel prejudice").

Smith v. Phillips, 455 U.S. 209 (1982), does not foreclose the use of presumptions of prejudice or bias against potential jurors in appropriate circumstances. First, the majority opinion did not overrule, but rather cited with approval the *Wood*, *Frazier*, and *Dennis* cases. These cases explicitly state that in appropriate circumstances a court may imply bias. The Court's reliance on precedent expressly affirming the doctrine indicates an intent not to disavow, modify, or discard the existing applications of the implied bias doctrine and the substantial body of precedent articulating the concept.

Additionally, in a separate concurring opinion, Justice O'Connor wrote that "the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." She further stated:

While each case must turn on its own facts there are some extreme situations that would justify the finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial of the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction. Whether or not the state proceedings result in a finding of no bias, the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.

455 U.S. at 222 (1982) (O'Connor, J., concurring).

Furthermore, in deciding *Smith*, the Court relied heavily on *Remmer v. United States*, 347 U.S. 227 (1954), a case distinguishable from those involving allegations of implied bias. In *Remmer*, a juror in a federal criminal trial was offered a bribe in exchange for a favorable verdict. After trial, defense counsel learned of the incident and filed a motion for a new trial. The trial court denied the motion without a hearing. The Court reversed, stating:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . *The presumption is not conclusive*, but the burden rests heavily upon the Government to establish, after notice to and hearing of defendant, that such contact with the juror was harmless to defendant.

347 U.S. at 229 (emphasis supplied). The Court remanded the case to the district court to hold a hearing to determine whether the incident was prejudicial to the defendant.

Smith and *Remmer* are clearly distinguishable from cases involving impairment of the right to exercise peremptory challenges. In *Smith*, as in *Remmer*, the allegation of partiality arose out of improper jury contact during trial rather than a juror's failure to disclose information on voir dire. The cases do not involve prejudice which existed during the voir dire examination, because the events giving rise to the presumption of prejudice occurred after the jury had been impanelled, i.e., after the point at which the right to exercise challenges for cause or peremptory challenges had passed. *Smith* and *Remmer* hold that improper juror contact creates only a *rebuttable* presumption of prejudice. In contrast, a juror's pre-existing relationship may create a *conclusive* presumption of bias. *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("... with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given").

In addition, unlike *Smith*, this case does not involve the issue of federal-state comity. As the Court noted in *Smith*, a habeas corpus case, "federal courts hold no supervisory authority over state judicial proceedings and may only intervene to correct wrongs of constitutional dimension." 455 U.S. at 221. If the facts in the instant case had arisen in the context of a state criminal proceeding, the petitioner would have had no federal recourse, since the right to exercise peremptory challenges is not secured by the Constitution. *Stilson v. United States*, 250 U.S. 583 (1919). However, having recognized the essential role played by peremptory challenges in securing a fair trial, this Court may, pursuant to its supervisory power over the lower federal

courts, formulate rules relating to voir dire examination which will protect the peremptory challenge right. The Tenth Circuit rule is the most reasoned and effective means of ensuring this right.³

Petitioner claims that the appropriate course where allegations of juror nondisclosure are made is to hold a hearing to determine actual bias. This position misperceives the nature of appropriate inquiry. The legal issue to be resolved is whether a party has been denied its right to exercise a peremptory challenge. To determine that issue the court need focus only upon (1) the nature of the information withheld and (2) the relationship of that information to the parties or issues in the case. Although a court must have a sufficient factual basis for justifying its con-

³ MDL 403 illustrates the reality and seriousness of juror nondisclosure during voir dire. There, a person with three children who were plaintiff class members served as a juror despite extraordinary efforts to ferret out such disqualified persons. The district court recognized the difficulty of impanelling an impartial jury due to the fact that most potential jurors were customers or closely related to customers of the defendant gas utility Southern Union. Therefore, the court sent a questionnaire to potential jurors which inquired, *inter alia*, whether they or their relatives were Southern Union customers. "Relatives" was specifically defined to include children. Any person answering "yes" was automatically excused for cause. The juror in question gave a false "no" answer on his questionnaire. During voir dire, the trial court directed the same question to the jury panel. Again the juror failed to respond accurately. The district court held that the juror's failure to disclose his children's status impaired Southern Union's right to exercise a peremptory challenge and granted a new trial. Thus, juror nondisclosure of material information is not a merely hypothetical problem. It is a real problem which occurs in a variety of circumstances even more egregious than those in *Greenwood*. Where such nondisclosure results in the substantial impairment of important rights, the appropriate remedy, a new trial, must be available.

clusion⁴ those facts may be obtained by means other than a hearing at which a juror is forced to testify. Indeed, this Court should not set down a rule requiring a hearing in all circumstances because the spectre of jurors being hauled into a hearing may diminish a citizen's willingness to serve as a juror.

IV. CONCLUSION

The Tenth Circuit has recognized that counsel is entitled to material information when exercising peremptory challenges. The rule embodied in *Greenwood*, *Photostat* and *Carver* does not require a new trial each time a juror fails to answer a question during voir dire. Indeed the court states that if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge "has not been affected." *Photostat Corp. v. Ball*, 338 F.2d at 786. However, where the suppressed information is sufficiently indicative of bias either against a party or relating to some issue or factor in the case, it is information which a party was entitled to know and the juror's failure to disclose it denies the peremptory challenge right.⁵ If


⁴ Petitioner suggests that as a condition for granting a new trial a litigant prove that the nondisclosed information affected the jury deliberations. Petitioner's Brief on the Merits at 31. This rule would *never* allow litigants to gain new trials on the ground of juror nondisclosure. Fed.R. Evid. 606(b) provides in part: "... a juror may not testify . . . to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . ." The rule forecloses use of juror testimony to ascertain the effect of nondisclosed information on a verdict. *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981); *United States v. Greer*, 620 F.2d 1383 (10th Cir. 1980).

⁵ Of course, if the Court determines that the current record provides an inadequate factual basis to determine the denial of the peremptory challenge right, it can remand for the development of a more complete factual record.

the peremptory challenge is to be more than a meaningless ritual, this Court must uphold the rule expressed in *Greenwood*.

Wherefore, Southern Union prays that the judgment of the Tenth Circuit be affirmed.

Respectfully submitted,


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 Southern Union Company and
 Southern Union Gathering
 Company

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing BRIEF OF AMICUS CURIAE SOUTHERN UNION COMPANY have been mailed this 19th day of September, 1983, to Donald Patterson, Esq., 520 First National Bank Tower, Topeka, Kansas 66603, Attorney for Petitioner, and Dan L. Wulz, 115 East Seventh Street, Topeka, Kansas 66603, Attorney for Respondents.


 JERRY L. BEANE

APPENDIX I

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**IN RE: NEW MEXICO NATURAL GAS
ANTITRUST LITIGATIONS**

**MEMORANDUM DECISION AND ORDER
GRANTING DEFENDANTS' SECOND
SUPPLEMENTAL MOTION FOR NEW TRIAL
BASED ON JUROR DISQUALIFICATION**

MDL No. 403

All Cases

Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification was orally argued on January 3, 1983. Prior to the hearing, the court reviewed all memoranda of counsel. Following the hearing, the court took the matter under advisement and has since reread the memoranda of counsel and read various authorities cited therein. Based on the foregoing, the court renders the following decision.

This matter is before the court on the Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification. That motion rests on two grounds: (1) defendants were denied their right to a fair and impartial jury, and (2) defendants were denied their right to exercise a peremptory challenge. Because the court finds that the defendants' second argument is meritorious, it will not reach the question of whether the issue of the impairment of the right to a fair and impartial jury is a separate and independent inquiry from the issue of impairment of the right to exercise a peremptory challenge and if so, whether an evidentiary hearing is necessary in the former instance to establish probable bias.

This consolidated litigation consists of five related actions. One of the actions, *Brewer, et al v. Southern Union Company, et al*, CIV 79-578-HB, was brought on behalf of all residential gas customers of Southern Union Company in New Mexico. The class certified in that action is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." Because Southern Union Company operates as a regulated gas utility in most areas of New Mexico through its division Gas Company of New Mexico, a majority of those persons normally available for jury service in New Mexico were class plaintiffs in the *Brewer* case.

Recognizing the difficulty of impaneling an impartial jury in this case, the presiding judge, Judge Bratton, requested counsel to submit proposed questions to be included in the questionnaire to be sent to prospective jurors. Defendant Southern Union Company's counsel submitted a proposed questionnaire which specifically asked whether potential jurors were class members or had relatives who were class members.¹ The court supplemented the standard juror questionnaire sent to all potential jurors with

¹ The plaintiffs strongly opposed the inclusion of questions in the Jury Questionnaire that went beyond those specifically provided in 28 U.S.C. § 1865(b) and the automatic exclusion of any jury on the basis of such questions. In light of the court's decision to reject that position, the plaintiffs submitted a proposed questionnaire that narrowed the scope of inquiry the court had suggested. The court also rejected that proposal.

The plaintiffs' position, however, is immaterial to the resolution of this issue. What is important is the steps that were actually taken to ensure that every member of the jury panel was qualified to serve as a juror in this case.

an addendum asking prospective jurors the following question:

Within the past eight (8) years have you, your spouse or any of your relatives been an employee of or a residential natural gas customer of the Gas Company of New Mexico or Southern Union?"²

Any person who answered "yes" to that question was automatically excluded from the potential jury venire.

As an additional effort to exclude from the jury those potential jurors who were members of or had relatives who were members of the *Brewer* class, Judge Bratton asked during the voir dire examination whether anyone on the jury venire wanted to change his answer on the questionnaire to the question whether he or any relative, as that term was defined in the questionnaire, had ever been a customer of Gas Company of New Mexico or Southern Union during the last eight years. One potential juror responded that she had inadvertently omitted to state on her questionnaire that she had been a customer of Southern Union about six and one-half years ago. The court immediately excused that juror for cause.

Mr. Dan Virden was selected and served as a juror in this case. He stated on the supplemental questionnaire that none of his relatives were class members, and he remained silent during the voir dire examination when the court asked if any prospective juror wanted to change his answer on the questionnaire. Despite his representations that none of his relatives were class members, it is undisputed that

² The term "relatives" was expressly defined in the questionnaire as "children (natural or adopted), parents (including stepfathers and stepmothers), grandparents, and brothers and sisters (including half-brothers and half-sisters), for both you and your spouse."

Dan Virden has three children who have been residential gas customers of Southern Union Company for some period of time since July, 1976 and that none of those children opted out as a class member during either of two class notice opt-out opportunities. Thus, if juror Dan Virden had correctly answered the supplemental questionnaire, he would have automatically been excluded from the prospective jury panel; if juror Virden had changed his answer to the questionnaire during the court's voir dire examination, he would have been excused for cause.

It is well settled in the Tenth Circuit that a new trial must be granted where a party's statutory right to exercise a peremptory challenge has been prejudicially impaired. *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982); *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964); *Consolidated Gas & Equipment Company of America v. Carver*, 257 F.2d 111 (10th Cir. 1958). The standard used by the Tenth Circuit to determine whether that right has been prejudicially impaired by a juror's failure to fully and truthfully answer questions propounded to the panel is whether there has been "a showing of probable bias of the juror with consequential prejudice to the unsuccessful litigant." *Greenwood v. McDonough Power Equipment, Inc.* 687 F.2d 338, 342 (10th Cir. 1982). Although the plaintiffs contend that the showing of probable juror bias and consequential prejudice to the defendants can only be made if there is an evidentiary hearing, that is not the law in this circuit. Rather, the requisite showing of probable bias and consequential prejudice has been made "if the suppressed information was of sufficient cogency and significance to cause [the court] to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge." *Photostat Corporation v. Ball*, 338 F.2d 783, 787 (10th Cir. 1964).

In this case, the court is convinced that the information withheld by the juror Virden³ was information that the defendants' counsel were entitled to know when they exercised their peremptory challenges. One of the main concerns of the court and the parties from the outset of this case was to ensure that the jury was impartial. To accomplish that result, great pains were taken to exclude from the potential jury venire persons whose relatives were members of the *Brewer* class and to excuse for cause any member of the jury venire who had such relatives. It is beyond question that information which would lead to automatic exclusion or to a successful challenge for cause was information that defendants' counsel were entitled to know when exercising their peremptory challenges.⁴ Thus, the facts on the record are sufficient to find that the defendants' right of peremptory challenge was prejudicially impaired, entitling them to a new trial.

Although counsel may waive his right to challenge the qualifications of a juror by failing to exercise reasonable diligence in questioning potential jurors, *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966), the defendants' counsel in this case did all that was required of them under the circumstances to preserve their right to challenge the qualifications of juror Virden.⁵ On two separate occasions, each

³ It is immaterial whether the failure to disclose the information was inadvertent or intentional. *Greenwood v. McDonough Power Equip., Inc.*, 687 F.2d 338, 342 (10th Cir. 1982).

⁴ It does not matter whether the defendants' counsel would have actually peremptorily challenged juror Virden had he disclosed the information. See *Greenwood v. McDonough Power Equip., Inc.*, 687 F.2d 338, 342 (10th Cir. 1982).

⁵ The plaintiffs' reliance on *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966) to establish that the defendants failed to make a diligent inquiry is misplaced. In *Brown*, the court found that

prospective juror was asked whether any of his relatives were or had been a customer of the Gas Company of New Mexico or Southern Union Company; each time the question was asked, it was clearly stated and unambiguous. In each instance, Juror Virden unequivocally represented that his relatives were not and had not been customers of the Gas Company of New Mexico or Southern Union Company. Thus, any further questioning on that subject was completely unnecessary.

IT IS THEREFORE ORDERED that the Defendants' Second Supplemental Motion for New Trial Based on Juror Disqualification be and hereby is granted.

Dated this 17th day of January, 1983.

/s/ David K. Winder

DAVID K. WINDER

United States District Judge

the term "immediate family" was ambiguous and had not been defined and that counsel had failed to explain to the prospective jurors that the term "immediate family" included a relative such as brother.

APPENDIX II

II-1

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

FILED MAY 20, 1982
U.S. Court of Appeals Fourth Circuit

No. 81-1812

MAUDELL H. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1813

FLETCHER L. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1814

SOUTHEASTERN FREIGHT LINES,

Appellee,

v.

MICHELIN TIRE CORPORATION AND
LA MANUFACTURE FRANCAISE
DES PNEUMATIQUES MICHELIN,

Appellants.

II-2

Appeals from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge.

Argued February 2, 1982

Decided May 20, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit

Judge, and PHILLIPS, Circuit Judge.

Sam Daniels (Daniels and Hicks; John M. Kenney, John M. Kenney, P.C.; Joseph R. Young, Young, Clement, Rivers & Tisdale; Wade H. Logan, III, Holmes, Thomson, Logan & Cantrell on brief) for Appellants; Cody W. Smith Jr. (Solomon, Kahn, Smith & Baumil on brief) for Appellees.

PER CURIAM:

This diversity action for personal injuries arose from a collision between a tractor-trailer unit and a tanker rig, the latter being equipped with tires manufactured by defendants, one of which blew out in the course of the collision. As a result of a stipulation between the parties entered into after a prior appeal, the determinative question as to liability was whether the tire blew out without being penetrated by an external object or whether the blowout resulted from the penetration of an external object.

On conflicting evidence, the jury found that the tire blew out without being penetrated by an external object and it awarded substantial damages to plaintiffs. Defendants appeal contending that the judgment entered on the verdict should be reversed and a new trial awarded because of reversible error in (1) the failure of the juror who was selected as foreman to disclose that as plaintiff she had settled a personal injury claim and had another pending while she served in the instant case, and the failure of two other jurors to disclose that they had prior experience with tire blowouts, despite interrogation on voir dire about

both subjects, and (2) the admission into evidence of a portion of a written statement of the deceased driver of one of the vehicles taken by an insurance adjustor.

We affirm.

VOIR DIRE

A. Failure to Disclose Personal Injury Claims.

The entire venue was questioned by the district court as follows:

Have any of you ever been a Plaintiff or a Defendant in an action brought for damages? If so, please stand and give your name.

Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Caryl C. Polk, who was appointed foreman of the jury by the district court after all of the evidence was received, did not respond to either question. At a post-verdict hearing, it was shown that she had brought a suit for personal injuries as a result of an automobile accident in 1974, that that case was settled, that she had been involved in an accident in December 1980, and that after retaining counsel that case was also settled after the trial of the instant case. The 1974 accident did not involve the blowout of a tire, nor did Mrs. Polk sustain injuries comparable to those of the plaintiff in the instant case. The details of the 1980 accident were not developed.

Mrs. Polk testified that she was sitting in the back of the courtroom during voir dire and heard neither question about whether she had been sued or sued anyone. She did not communicate the fact of either accident to other jurors, and she also testified that she did not intentionally or deliberately withhold information from the district court.

The district court found that Mrs. Polk did not intentionally or deliberately withhold information and it concluded that defendants were not prejudiced by her service as a juror.

B. Failure to Disclose Blowout Experience.

The venire was also asked:

Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire blew out? If so, please stand and explain the circumstances.

Neither Mrs. Pennington nor Mrs. Carrigg, both of whom served as jurors, respond to this question.

In the post-verdict proceedings, it was established that about ten years before, Mrs. Pennington had been operating a vehicle when a tire blew out. She testified that the incident was so insignificant that she did not recall it during voir dire and she did not recollect it until she was questioned during a lengthy telephone conversation by defendants' lawyers. She also testified that she did not remember the make of the tire involved nor the nature of the problem with the tire. She did not consider the tire defective and she received no injuries. She claimed that she had not knowingly withheld information from the district court.

Mrs. Carrigg, too, had had an experience comparable to a blowout. She had steered her vehicle into a curb to avoid a collision with another vehicle and the impact with the curb caused her tire to blow out. She said that her experience was unlike the evidence that she had heard in the instant case.

The district court found that neither juror had intentionally failed to respond to voir dire. With regard to Mrs. Carrigg, the court expressed doubt as to whether her ex-

perience constituted a blowout, and, with regard to Mrs. Pennington, found that she had not recalled her experience during voir dire. Based upon other testimony, the district court found that neither juror had discussed her experience in the jury room and that the experiences of both were dissimilar to what happened in the case at bar.

C. Discussion and Ruling.

With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See* United States v. Bynum, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy v. Golstein* [sic], 652 F.2d 654 658 (6 Cir. 1981). But, here, where the nondisclosure was not deliberate, the only inquiry is whether the jurors' post-verdict responses disclosed actual bias or prejudice as a matter of law. *See* United States v. Vargas, 606 F.2d 341, 344 (1 Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test. In the case of Mrs. Polk, neither of her accidents was shown to have any similarity to the case she was hearing and neither was shown to have involved a blowout. In as litigious a country as the United States and in as litigious an era as the present, we cannot say as a matter of law that one who has been a litigant is ineligible from that fact alone for jury service in a suit for personal injuries. With regard to Mrs. Carrigg and Mrs. Pennington, the possibility of bias or prejudice is even less. While Mrs. Pennington had had experience with a blowout, the incident was so remote and so insignificant that she did not recall it, or, when her recollection was refreshed, any of its significant details. Mrs. Carrigg's experience, while technically, perhaps, with a blowout, was so dissimilar to the case in which she sat that we cannot

conclude that her ability to be an objective juror was adversely affected.

ADMISSIBILITY OF WRITTEN STATEMENT

Mr. Mitchell Barnhill was the operator of the tanker rig which was involved in the collision. Within the period of five to fifteen minutes after the collision, he made several comments about how the accident occurred to other truck drivers who had stopped to give assistance. At trial, they were permitted to testify about what Barnhill had said, apparently under the excited utterance exception to the rule against hearsay. Rule 803(a), Fed. R. Evid. His statements were to the effect that he heard a loud explosion and thereafter felt an impact to his vehicle.

A week after the accident, Barnhill was interviewed by an insurance adjustor and gave a written, unsworn statement which he signed, page by page. By the time of the trial, Barnhill had died from causes unrelated to the accident, and at trial, a portion of his statement was read to the jury. The statement, in essence, was that the explosion occurred before the impact, a most material fact under the stipulation of the parties as to liability. The district court ruled this portion admissible under Fed. R. Evid. Rules 803(24) (the catchall "other exceptions" exception to the rule against hearsay) and 804(b)(5) (permitting admission of written statements given under certain guarantees of trustworthiness).

We think it debatable whether the statement was admissible under the rules, but it is unnecessary for us to resolve the issue. Even if inadmissible, the portion of the statement admitted was merely cumulative of the excited utterances which were clearly admissible. Any error was therefore harmless.

AFFIRMED.

NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF
OUT-OF-TIME WAS DENIED BY THE COURT ON OCTOBER
31, 1983 (52 LW 3341), BUT IS REPRODUCED HEREIN
IN THE INTEREST OF COMPLETENESS.

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No. 82-958

IN THE
Supreme Court of the United States

October Term, 1982

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

v.

BILLY G. GREENWOOD, a minor child,
by his parents and natural guardians,
JOHN G. GREENWOOD and FRED A
GREENWOOD; JOHN G. GREENWOOD,
individually; and FRED A GREENWOOD,
individually,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION BY SHEILA BREWER FOR LEAVE
TO FILE A BRIEF AS AMICUS CURIAE
UPON THE CONSENT OF THE PARTIES
AND
BRIEF OF AMICUS CURIAE
SHEILA BREWER

IN SUPPORT OF REVERSAL

STEVEN L. TUCKER
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**MOTION BY SHEILA BREWER FOR LEAVE
TO FILE A BRIEF AS AMICUS CURIAE
UPON THE CONSENT OF THE PARTIES**

SHEILA BREWER, by and through her attorneys, JONES, GALLEGOS, SNEAD & WERTHEIM, P.A., hereby moves for leave to file a brief as *amicus curiae* in this cause and as grounds for this Motion states:

1. Petitioner McDonough Power Equipment, Inc. and respondents Billy G. Greenwood, etc., et al., have filed their written consent to this Motion and to the filing of the Brief of *amicus curiae* Sheila Brewer.

2. This Court has received a Brief filed by *amicus curiae* Southern Union Company in support of the respondents.

3. The interest of *amicus curiae* Southern Union Company (hereinafter "Southern Union"), as stated in its Brief, is that of a defendant in several consolidated actions currently pending in the District Court of Colorado styled *In Re New Mexico Natural Gas Antitrust Litigation*, MDL Docket No. 403 (Southern Union's Brief, pp. 1-2). One of those proceedings is *Sheila Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578 HB, a class action brought on behalf of all residential gas customers of Southern Union Company in the State of New Mexico. (*Id.* at 2).

4. In further explanation of its interest in this proceeding, Southern Union stated in its Brief that, after the jury had returned a liability verdict against Southern Union in the above-referenced consolidated proceedings, it was determined that one of the jurors had three children who were members of the certified class, namely, "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976, and February 28, 1981." (*Id.* at 2). That information was contrary to a response by that juror in a jury questionnaire submitted to prospective jurors prior to trial. Southern Union moved for a new trial based upon that discrepancy. Plaintiffs sought but were denied an evidentiary hearing on the issue of the juror's actual bias and, specifically, on the issue of whether that juror's response was knowingly false. Based upon *Greenwood v. McDonough Power Equipment Co., Inc.*, 687 F.2d 338 (10th Cir. 1982), the trial court granted defendants' Motion for New Trial without an evidentiary hearing. A subsequent deposition of the juror contained substantial evidence that the juror did not know that any of his children were customers of Southern Union until after the verdict had been returned. (*See*, Appendix II).

5. The interests of *amicus curiae* Sheila Brewer are at least as great as those of *amicus curiae* Southern Union Company in the proper resolution of this proceeding.

6. Neither Sheila Brewer nor her counsel was given notice that Southern Union Company had sought or was granted consent to file a brief as *amicus curiae* until September 24, 1983, when counsel first learned that such a brief had been filed. Counsel for Brewer has proceeded as expeditiously as possible thereafter to file this Motion.

7. *Amicus curiae* Sheila Brewer respectfully submits that this Motion should be granted (1) to insure a balanced presentation of the facts and issues in *Brewer, et al. v. Southern Union Company, et al., supra*, to the extent Southern Union's discussion of that case may have some bearing on this one and (2) otherwise to assist the Court in the resolution of the case before it.

Respectfully submitted,

JONES, GALLEGOS, SNEAD &
WERTHEIM, P.A.

Attorneys for Amicus Curiae
Sheila Brewer

By _____

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CERTIFICATE OF SERVICE

I certify that 3 true copies of the foregoing Motion by Sheila Brewer For Leave to File a Brief as Amicus Curiae Upon Consent of the Parties and Brief of Amicus Curiae Sheila Brewer have been mailed, by first-class mail, postage prepaid, to Donald Patterson, Esq., Attorney for Petitioner, 520 First National Bank Tower, Topeka, Kansas 66603; Dan L. Wulz, Esq., Attorney for Respondents, 115 East Seventh Street, Topeka, Kansas 66603; and to Jerry L. Beane, Esq., Attorney for Southern Union Company, 1200 One Main Place, Dallas, Texas 75202, on this 10th day of October, 1983.

STEVEN L. TUCKER

APPENDIX I

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BRIEF OF AMICUS CURIAE
SHEILA BREWER

I.

STATEMENT OF INTEREST

Amicus curiae Sheila Brewer files this brief to support the proposition that a new trial based upon alleged juror bias cannot be granted without an evidentiary hearing on the issue of the jurors actual bias and a supported finding of actual bias. Insofar as this position is at least an alternative position urged by all parties to this case, *amicus curiae* Sheila Brewer supports petitioner and respondents.

The interest of *amicus curiae* Sheila Brewer arises from her status as plaintiff in an antitrust class action currently pending in the United States District Court of the District of Colorado styled *Brewer, et al. v. Southern Union Company, et al.*, CIV 79-578 HB (hereinafter "the Brewer case"). The certified class in the *Brewer* case is defined as "residential consumers . . . who purchased natural gas from Southern Union . . . at any time between June 30, 1976 and February 28, 1981." The class consists of approximately 280,000 individuals.

The *Brewer* case was consolidated by the Judicial Panel for Multidistrict Litigation with a similar lawsuit filed by fourteen agencies and universities of the State of New Mexico, a similar lawsuit filed by the major electric utility in New Mexico, and a similar lawsuit by some farmers in New Mexico and Texas. (The farmers' suit was later settled). The consolidated proceedings are styled *In Re New Mexico Natural Gas Antitrust Litigation*, MDL Docket No. 403. Estimated single damages sought by all plaintiffs exceeds \$191 million, which would be trebled in the event of a judgment in their favor. Prior to trial, two of the five defendants settled for a combined total of approximately \$11 million.

Trial as to the remaining three defendants was bifurcated as to liability and damages. As Southern Union correctly stated:

Because many potential jurors were either class members or closely related to class members, the trial court and counsel made extraordinary efforts to ensure that neither group served as jurors.

Brief of Amicus Curiae Southern Union Company, p.2.

Trial was moved to Las Cruces, New Mexico and the jury was drawn from that area of the state because Southern Union is not the primary natural gas utility in that region. Prior to being called for jury duty, a juror questionnaire was sent to numerous prospective jurors in an effort to identify, among other things,

potential jurors who were customers or related to customers of Southern Union. *Voire dire* was also conducted on this issue, a jury was ultimately selected and trial began.

After seven weeks of trial in February and March of 1982, the jury returned a verdict in favor of plaintiffs. Shortly thereafter, Southern Union came forward with evidence that three of its customers were the children of one of the jurors, Dan Virden. Juror Virden had answered "no" to the juror questionnaire inquiring as to whether he had any relatives who were customers of Southern Union. He had also remained silent during *voir dire* when a similar question was asked.

With this evidence, Southern Union moved for a new trial in all of the consolidated proceedings on the grounds of juror bias. Plaintiffs sought an evidentiary hearing on the issue. The trial court denied plaintiffs' request for an evidentiary hearing and granted the motion for new trial in all of the consolidated cases, based heavily on the recent opinion of the Tenth Circuit in *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982). Thereafter, the case was assigned to the District of Colorado and to another judge, for reasons unrelated to this issue.

Juror Virden was later deposed by all parties under the supervision of a retired state judge. The substance of his testimony was that he did not know any of his children were ever customers of Southern Union.¹ All of the three children in

¹ Excerpts from the deposition of juror Virden are reprinted and contained in Appendix II, *infra*. The entire deposition was not included because of its length. Southern Union would undoubtedly emphasize testimony not included in this excerpt to argue that this juror had constructive knowledge of his children's status or perhaps that actual knowledge could be inferred. The only purpose of including any of the deposition, however, is to demonstrate the need for an evidentiary hearing.

question were grown, had married, lived away from home and were ". . . on their own and making their own life." (App. II at II-10). The juror's answer to the questionnaire, although later proven erroneous, was based upon his own understanding. "As far as I knew at the time, that's the way it was." (App. II at II-7).

After new trial had been granted, two of the remaining defendants entered into settlement agreements with the plaintiffs, which are pending court approval. The combined settlements are for approximately \$52 million. The consolidated cases are awaiting a new trial against the remaining defendant, Southern Union Company.

In these consolidated cases, a juror error on a questionnaire automatically nullified a seven-week trial, resulted in a two-year delay, resulted in plaintiffs having to compromise by millions of dollars what would otherwise have been an adjudicated claim, and voided a finding of liability against all defendants. This result obtained without any evidence of actual bias on the part of that juror and, in fact, despite later-discovered evidence that the juror had no actual bias.

Because the original verdict against the remaining defendant could be reinstated and a new trial avoided, depending upon the Court's disposition of the *McDonough Power* case, *amicus curiae* Sheila Brewer respectfully moves for leave to file this brief.

II.

SUMMARY OF ARGUMENT

A. Only last year, the Court held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, ___ U.S. ___, 102 S.Ct. 940, 945 (1982). That decision, together with the previous decisions of the Court discussed therein, makes clear that a verdict will not be set aside for alleged juror bias unless and until actual bias is established in an evidentiary hearing. The lower court in this case has articulated a new formula which is irreconcilable with the decisions of this Court. The Tenth Circuit has transformed the issue of actual bias into a legal issue divorced from any evidence of the juror's actual knowledge, intent, or state of mind. Accordingly, the judgment of the lower court must be reversed.

B. An erroneous failure to respond or an erroneous response by a juror does not necessarily or universally conceal a biased mind. For example, a juror may not know that a particular answer was false; one cannot be biased due to a condition or relationship of which one has no knowledge. Yet the judgment of the lower court would presume bias and require a new trial regardless of the juror's actual knowledge. This point is illustrated by the application of the Tenth Circuit's opinion in the *Greenwood* case to the *Brewer* case, in which *amicus curiae* Southern Union and Sheila Brewer are parties. Aside from lack of knowledge, other evidence may demonstrate that a juror was not biased, despite an omitted or erroneous answer. Accordingly, bias should not be the subject of an irrebuttable presumption. Moreover, an evidentiary hearing is not only available as an alternative means for making the determination of bias, it is the proper procedure for challenging juror bias. The question of bias is a question of fact and, particularly when the validity of a prior trial hangs in the

balance, the parties are entitled to the opportunity to adduce evidence on the issue before a new trial may be granted.

III.

ARGUMENT

A. The Remedy for Alleged Juror Bias is an Evidentiary Hearing on the Issue of Actual Bias.

The issues presented in this case have already been decided by the Court, most recently in *Smith v. Phillips*, ___ U.S. ___, 102 S.Ct. 940 (1982). In that case a defendant in a criminal case was convicted in state court after a jury trial. Defendant later moved to vacate the conviction on the grounds that one of the jurors failed to disclose that he had applied for a position with the District Attorney's office. An evidentiary hearing was held in state court, after which the judge found that the juror was not biased. Defendant then sought habeas corpus relief in federal court. The federal district court did not disagree with the findings of the state court nor did it find evidence of actual bias. However, the federal district court imputed bias to the juror because "the average man in [the juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application." *Id.* at 944. The appellate court affirmed, on a different ground, and this Court reversed.

This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id. at 945.

The Court then reviewed its prior decisions rejecting an imputation of bias and reaffirming the requirement of establishing actual bias at an evidentiary hearing. *Chandler v. Florida*, 449 U.S. 560 (1981); *Remmer v. United States*, 347 U.S. 227 (1954); *Frazier v. United States*, 335 U.S. 497 (1948); *United States v. Wood*, 299 U.S. 123 (1936).

The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Smith v. Phillips, *supra*, 102 S.Ct. at 946. (Footnote omitted).

Unless a criminal defendant has lesser right to a fair trial than a civil litigant, then the decision in *Smith v. Phillips*, *supra*, and the decisions upon which it relies control this case. In a challenge of a jury's determination on the grounds of juror bias, the test is *actual bias* on the part of the juror in question and the burden is on the moving party to establish *actual bias*.

While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as demonstrable reality.

Beck v. Washington, 369 U.S. 541, 558 (1962).

The judgment of the Tenth Circuit in *Greenwood v. McDonough Power Equipment Co., Inc.*, 687 F.2d 338 (10th Cir. 1982), cannot be reconciled with the prior decisions of this Court. It replaces the actual bias standard with an "objective" test applicable to the "average juror." It expressly holds that the juror's actual state of mind is irrelevant. It forecloses the evidentiary hearing on the issue of bias which is precisely

the procedure which this Court has held to be the appropriate remedy where juror bias is alleged. Accordingly, it must be reversed.

B. An Irrebuttable Presumption of Bias from a Juror's Response or Failure to Respond to a Question Is Unjustifiable Because the Means for Establishing Actual Bias, *Vel Non*, Is An Evidentiary Hearing.

The rule announced by the Tenth Circuit in the opinion below is commendable in its simplicity but disastrous in its effect. Reduced to its basic terms, that rule is that a losing litigant automatically gets a new trial whenever he can show, after trial, that a juror failed to disclose significant information upon request or gave incorrect information. Without more, the court held, probable bias is established. Information is deemed significant if it is of "sufficient cogency and significance" to cause "us" to believe that the losing party "was entitled to know of it" when he exercised his peremptory challenge. *Greenwood v. McDonough Power Equipment, Inc.*, *supra*, at 342. Although the Court called this an objective test, it appears to rest entirely upon the subjective opinion of the court as to what is significant.

Missing from the formula established below is the only element that counts: evidence of actual bias on the part of the juror. *Smith v. Phillips*, *supra*. The court below replaced the actual bias standard with an irrebuttable presumption of bias based not upon the juror's state of mind but solely upon a failure to respond or an erroneous response by the juror.

Irrebuttable presumptions which affect rights protected by the due process clause of the United States Constitution "have long been disfavored." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 645 (1974), quoting from *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Such a presumption "is forbidden . . . when that presumption is not necessarily or

universally true in fact and when the State has reasonable alternative means of making the crucial determination." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 645 (1974).

It is not necessarily nor universally true that a juror who fails to disclose or erroneously discloses important information is, in fact, biased. For example, a juror cannot be biased by a fact of which he has no actual knowledge. See, *United States v. Brooks*, 677 F.2d 907 (D.C.Cir. 1982); *Jackson v. United States*, 408 F.2d 306 (9th Cir. 1969). This point is well-illustrated by the *Brewer* case, in which *amici curiae* before this court are parties. That is a class action on behalf of approximately 280,000 residential customers of Southern Union, a natural gas utility. The trial of the case was moved to Las Cruces, New Mexico, and the jurors were drawn from that region of the state for the express reason that Southern Union is not the primary gas utility in that area. After a seven-week jury trial on the issue of liability, a verdict in favor of plaintiffs was nullified because one of the jurors, Dan Virden, was unaware of, and therefore failed to accurately disclose, the fact that two of his sons and one daughter had, at some time between June 30, 1976 and February 28, 1981, been customers of Southern Union.² Dan Virden lived in a rural area and was not only not a customer of Southern Union, he used butane, not natural gas. (App. II at II-3, II-10). None of those three children (Richard, Lynn, and Roy) lived with their father. (App. II at II-6). All of them were grown and had married. (App. II at II-4, II-6). As Mr. Virden testified, "the kids all went on their own, and I just — they weren't in my mind. I didn't think about who was getting gas or electricity or water or something else. They was [sic] on their own and making their own life." (App. II at II-10).

² Excerpts from the deposition of Dan Virden are attached as Appendix II.

When Dan Virden responded in a juror questionnaire that he had no relatives who were customers of Southern Union during the relevant time period, he simply did not know otherwise. (App. II at II-9). After the verdict was returned against them, Southern Union came forward with evidence that three of its customers were his children and obtained an automatic new trial with that information, based upon the *Greenwood* case. The fact of the juror's lack of knowledge did not come to light until after the court had denied plaintiffs an evidentiary hearing and had granted a new trial.

Aside from lack of knowledge, a failure to properly respond could be based upon a juror's misunderstanding of the question. For example, suppose the term "relatives" is not defined in a question on that subject and a juror assumes that a distant cousin was not included. Under the *Greenwood* rule, the losing party gets a new trial if the court believes that the "average juror" would have thought cousins were included in that question. A "misunderstanding of the voir dire question, does not foreclose the conclusion that the right to peremptory challenge was substantially impaired." *Greenwood, supra*, at 343. The juror's relationship with the cousin may or may not establish actual bias but it does not "necessarily or universally" do so such that no further inquiry is necessary. See, *United States v. Sockel*, 478 F.2d 1134 (8th Cir. 1973); *United States v. Robbins*, 500 F.2d 650 (5th Cir. 1974); *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966); *United States v. Wander*, 465 F.Supp. 1013 (W.D.Pa. 1979), *appeal dismissed as moot*, 601 F.2d 1251 (3rd Cir. 1979).

Suppose a juror suddenly remembered that he or she failed to arrange to have a child picked up from school and, as a result of briefly worrying about that, failed to respond to a question on *voir dire* with a correct answer. This, too, would give the losing party an automatic new trial under the *Greenwood* rule because the failure to respond accurately establishes an irrebuttable presumption of bias. The possibilities are endless.

"Impartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145-146. An inaccurate or omitted response does not "necessarily or universally" cloak an actual bias.

Moreover, there is clearly another means available for determining bias other than an irrebuttable presumption. The rule followed in most circuits is that actual bias must be demonstrated in a post-trial evidentiary hearing. *See, United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777-778 (2nd Cir. 1978); *United States v. Wander*, 465 F.Supp. 1013 (W.D.Pa. 1979), *appeal dismissed as moot*, 601 F.2d 1251 (3d Cir. 1979); *United States v. Billings*, 692 F.2d 320, 325 (4th Cir. 1982); *Vezina v. Therist Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977), *after remand*, 610 F.2d 251, 252 (5th Cir. 1980); *McCoy v. Goldston*, 652 F.2d 654, 658 (6th Cir. 1981); *United States v. Currie*, 609 F.2d 1193 (6th Cir. 1979); *Christian v. Hertz Corporation*, 313 F.2d 174, 175 (7th Cir. 1963); *United States v. Sockel*, 478 F.2d 1134 (8th Cir. 1973); *De Rosier v. United States*, 407 F.2d 959, 963 (8th Cir. 1969); *Jackson v. United States*, 408 F.2d 306 (9th Cir. 1969); *Rogers v. McMullen*, 673 F.2d 1185, 1190 (11th Cir. 1982); *United States v. Brooks*, 677 F.2d 907 (D.C. Cir. 1982).

As demonstrated by the hypothetical situations just discussed, an evidentiary hearing allows the court and the parties to probe into the circumstances surrounding the juror's response or lack of response to a question. That type of inquiry is essential to a fair determination of the issue. Because "reasonable alternative means are available for making the crucial determination," an irrebuttable presumption of bias is unwarranted. Just because the Tenth Circuit's approach may be "easier" does not make it constitutionally acceptable. *Cleveland Board of Education v. LaFleur*, *supra* at 648. Moreover, while it may appear to conserve judicial resources in the short

run, its ultimate effect is surely to multiply dramatically the number of new trials. When a new trial is the automatic result, the losing party will now be encouraged to comb through jurors' backgrounds after trial to find some discrepancy on some item which counsel was "entitled to know." It is not only arbitrary and destructive of a party's right to the benefits of a fair trial, it substantially impairs the trial process itself.

The following quotation from *United States v. Vargas*, 606 F.2d 341, 346 (1st Cir. 1979), perceptively summarizes the position of *amicus curiae* Sheila Brewer on this issue:

We do not treat lightly the concealment of information by a prospective juror, but the jury system, despite its vital role in our jurisprudence, is not perfect. It is based on the assumption that a person's guilt or innocence can best be determined by twelve persons representing a fair cross section of the community. We try to eliminate bias and prejudice by juror questionnaires and voir dire examination. There is no way, however, of absolutely insuring that a prospective juror will answer honestly the questions put to him. The secrecy within which juror's deliberations are necessarily cloaked prevents us, in most cases from ever finding out the reasons and motivations for a verdict. When an individual betrays his trust, the only recourse is to try to determine, as was done here, whether there was such a showing of bias or prejudice as to require a new trial. This protects, insofar as is humanly possible, the integrity of the jury trial. A new trial would be a windfall for a defendant but it would have no prophylactic or deterrent effect on prospective jurors.

CONCLUSION

The trial court in this case did not go far enough. Once the issue of a possibly inaccurate response from a juror had been raised, an informal telephone conference between the

juror and counsel was permitted, but the Motion for New Trial was denied without an evidentiary hearing or even without the results of the telephone conference being reported to the court. On the other hand, the Court of Appeals went too far. It granted a new trial based solely upon its view of the unreported telephone conference and the significance of the information withheld, and held irrelevant all possible explanations for the juror's failure to respond.

This Court should reverse the judgment of the Tenth Circuit Court of Appeals with instructions to reverse the judgment of the trial court and to remand this cause to the trial court for an evidentiary hearing on plaintiffs' motion for a new trial.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

I certify that 3 true copies of the foregoing Brief of Amicus Curiae Sheila Brewer have been mailed, by first-class mail, postage prepaid, to Donald Patterson, Esq., Attorney for Petitioner, 520 First National Bank Tower, Topeka, Kansas 66603; Dan L. Wulz, Esq., Attorney for Respondents, 115 East Seventh Street, Topeka, Kansas 66603; and to Jerry L. Beane, Esq., Attorney for Southern Union Company, 1200 One Main Place, Dallas, Texas 75202, on this 10th day of October, 1983.

STEVEN L. TUCKER

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN RE NEW MEXICO NATURAL GAS)	No. MDL 403
ANTITRUST LITIGATION)	(Dist. of N.M.)
_____)	

DEPOSITION OF DAN EUGENE VIRDEN
SEPTEMBER 8, 1983

The deposition of DAN EUGENE VIRDEN was taken on behalf of the Plaintiffs at 9:00 a.m., Thursday, September 8, 1983, before DEBORAH O'BINE, Certified Shorthand Reporter of the firm of Santa Fe Deposition Service, 417 East Palace Avenue, Santa Fe, New Mexico, taken at the Conference Room at the office of Otero Savings & Loan Association, 723 New York Avenue, Alamogordo, New Mexico.

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ZINN**
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Page

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DAN EUGENE VIRDEN

The witness herein, after having
been first duly sworn upon his oath,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GALLEGOS:

Q Would you please state your full name?

A Dan Eugene Virden.

Q Where do you live, Mr. Virden?

A I live east of Tularosa, New Mexico.

* * *

Q That's in a rural area outside of Tularosa, New Mexico?

A Yes.

5 Q Where did you live prior to that?

A I lived in High Rolls, New Mexico.

Q Would you describe where High Rolls is?

A It's probably 15 miles east of Alamogordo, is where I lived.
At that time the box number was Box 83, High Rolls. I
lived there for about 18 years, 20 years or something.

Q High Rolls is a small mountain community east of Alamo-
gordo; is that correct?

A That's correct.

* * *

8 Q Are you married, Mr. Virden?

A Yes.

Q What is your wife's name?

A Bobbie Virden, B-o-b-b-i-e.

Q Have there been any children born to the marriage of you and Bobbie Virden?

A Yes. I have five.

Q What are their names, if you would give us that information, beginning with the oldest child?

A Richard Virden, Lynn Virden —

Q That's a lady?

A A girl, right, daughter. And Roy Virden, Russell Virden, and Robbie Virden.

Q What is the age of Richard Virden?

A Twenty-nine.

Q Where does he live presently?

A He lives north of Alamogordo.

Q On a ranch or farm?

A Well, it's about halfway between Tularosa and Alamo in a subdivision, rural area.

Q What is his occupation?

A He's Sheriff of Otero County.

9 Q As of the time period beginning in December of 1981 and ending in early February 1982, where did Richard Virden live, if you know?

A I think he lived there. He's been married ten years. He lived out there.

Q Where does Lynn Virden live?

A She lives west of La Luz, which is north of Alamogordo also.

Q That's a rural area?

A A rural area, right.

Q Is she married?

A Yes, to Brian Burkes.

Q How long have they been married?

A About ten years also.

Q How long have they lived west of La Luz?

A I don't know. They lived there, and then they went to Las Cruces, and she got her degree, and then they moved back there.

Q So beginning with her marriage to Brian Burkes, they lived in that area around La Luz?

A Right.

Q Then spent some time in Las Cruces?

A Right.

Q And then back to that location?

A That's right.

Q How old is she?

10 A Twenty-seven.

Q Where does Roy Virden live?

A He lives west of La Luz.

Q A farm, ranch?

A He lives in a trailer park west of La Luz.

Q What is his occupation?

A He's in the United States Air Force.

Q Where is he stationed?

A Holloman, New Mexico.

Q How old is he?

A About twenty-four, twenty-five.

Q What is the age of Russell Virden?

A Twenty-one.

Q Does he live at home?

A No, he lives in Las Cruces. He's going to college over there.

Q And Robbie Virden?

A He lives at home.

Q How old is he?

A Fifteen.

Q I don't believe I asked you how long Roy Virden had lived in that area west of La Luz. Can you tell us that?

A I don't know; a year and a half or two years or something. I don't remember.

11 Q Where did he live before that?

A I'm trying to think if he moved from my apartment up there or not, or he lived someplace else. He got married, and I don't know where all he lived. He was on his own again.

Q About when did he get married?

A He's got a little daughter, two; so it must have been about three years or so ago.

Q Three years, roughly?

A Yes, around '80.

Q About when did Roy Virden discontinue living at home and make his own residence?

A I guess it was about a year after he graduated out of high school; so whenever that was.

Q So that would have been when he was 19; six years ago? Would that be —

A Yes, something like that.

Q Have both Richard and Lynn made their own residence and lived away from home for at least ten years?

A Oh, yes.

* * *

12 Q I'm going to hand you, Mr. Virden, a single sheet that I've marked as Plaintiff's Exhibit No. 1, Virden Depo. And it's entitled: "Questionnaire Regarding Jury Qualifications." Do you recognize that?

A Yes, sir.

Q Does it bear your signature on the line that says "Signature of Prospective Juror"?

A Yes.

* * *

Q Question No. 1, which reads:

"Within the past eight years have you, your spouse or any of your relatives been an employee of or a residential natural gas customer of the Gas Company of New Mexico or Southern Union Company?"

13

It can be answered "yes" or "no," and the indication is that you answered that "no."

A That's right.

Q That was the way that you meant to answer that at that time?

A As far as I knew at that time, that's the way it was.

Q Did you in December of 1981, when you made the answer to this questionnaire, have any knowledge of the customer status of any of your children? By "customer status," that is, being customers of Gas Company of New Mexico or Southern Union?

A I didn't think about it, or I wouldn't have put "no" if I was aware of it. I don't remember just when the boy lived, for certain, but if I'd thought about it —

Q I'm asking you: What was in your mind at that time, Mr. Virden; not what you might have thought about or found out about or anything.

A At that time it was "no."

Q That was a true answer —

A That's right.

14 Q — based on your knowledge at that time?

A Right.

Q Between the time that you made this questionnaire, which was dated December 11, 1981, and February 2, 1981, [sic] when you were summoned to Las Cruces, was there any other inquiry made of you in any way or form as to your having relatives that were customers of Gas Company?

A No, I don't remember any.

Q After you made this questionnaire, did you mail it back to the United States District Court as you were instructed?

A That's right

Q Your answer is "yes"?

A Yes.

Q Did you give the matter any more thought after that?

A No.

Q What happened next in connection with your being called for service as a juror in the New Mexico Natural Gas Anti-trust Litigation?

A I was called over there to Las Cruces to the Federal Court Building and selected at that time to serve on the jury.

15 Q So the next thing was that you received a summons to appear on a designated date in Las Cruces?

A That's right.

Q When you appeared there, do you recall, sir, that there was a process of questioning of the jurors that went on?

A Right.

Q Judge Bratton was presiding?

A Right.

Q And he asked certain questions? Do you remember that?

A Yes.

Q Do you remember Judge Bratton asking a question to the effect of reminding the prospective jurors of the questions asked on the questionnaire concerning relatives being customers of Southern Union, and asking if any jurors had any different answer or wanted to change their answer; something to that effect?

A No, sir, I don't remember any of the questions the Judge asked.

Q As of that day, and if you will assume with me — I think I'm correct, that was February 2, 1982 — as of that day, did you have any knowledge that any of your children had been customers of Southern Union Gas or its division, its

16 so-called Gas Company of New Mexico?

A No, I didn't think of any of them being customers at all.

Q It wasn't in your mind that any of them were customers?

A No, sir.

Q Was then your answer, if it were put to you in words or substance, as it was in this questionnaire — was your answer then the same as of February 2, 1982; that to your knowledge, you had no relatives who had been or were residential natural gas customers of Southern Union or its division, Gas Company of New Mexico?

A Yes, sir.

* * *

18 Q Once you were selected as a juror in this case, Mr. Virden, as you undertook that service, did you have any knowledge that came to your mind, to your awareness, that somebody who was a relative as defined in this questionnaire was a gas customer of Gas Company of New Mexico?

A No, sir, I didn't — at the time I received this (indicating), and I was served, I didn't think about any of my relatives

being gas customers. The kids all went on their own, and I just — they weren't in my mind. I didn't think about who was getting gas or electricity or water or something else. They was on their own and making their own life. It didn't enter my mind.

Q You say "making their own life." Were the matters of their business affairs solely theirs and not anything that you were involved in?

19 A That's right.

* * *

39 Q Did you understand the document when you read it?

A I did at the time, because I thought at the time — I was thinking about me and the kids. We lived at the ranch east of Tularosa, and I lived in Tularosa, and we lived at High Rolls, and my kids lived with me. And at that time I'd never been a customer of Southern Union or had any connection with Southern Union; none. That's the reason I answered "no" here. That's where I lived. I lived east of Tularosa, where I was raised, and then moved to High Rolls after that, and we used butane there. And we moved east of Tularosa and used butane again. As far as when I filled this out, as far as I knew, that's the reason I put "no," because I've always used butane.

No. 82-958-CFX
Status: GRANTED

Title: McDonough Power Equipment, Inc., Petitioner
V.
Billy G. Greenwood, et al.

Docketed:
December 1, 1982

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Patterson, Donald

Counsel for respondent: Wulz, Dan L.

Entry	Date	Note	Proceedings and Orders
1	Dec 1 1982	G	Petition for writ of certiorari filed.
2	Jan 10 1983		Brief of respondents Billy G. Greenwood, et al. in opposition filed.
3	Jan 12 1983		DISTRIBUTED. February 18, 1983
4	Feb 15 1983		DISTRIBUTED. February 18, 1983
6	Feb 24 1983		DISTRIBUTED. February 25, 1983
7	Feb 24 1983		Record requested.
8	Mar 19 1983		Record filed.
9	Mar 19 1983		Certified C.A. proceedings received.
10	Mar 23 1983		Record filed.
11	Mar 23 1983		Certified original record (Box) received.
12	Mar 23 1983		DISTRIBUTED. April 15, 1983
14	May 9 1983		REDISTRIBUTED. May 12, 1983
16	May 16 1983		REDISTRIBUTED. May 19, 1983
19	May 23 1983		REDISTRIBUTED. May 26, 1983
21	May 31 1983		REDISTRIBUTED. June 2, 1983
23	Jun 6 1983		REDISTRIBUTED. June 9, 1983
25	Jun 13 1983		REDISTRIBUTED. June 16, 1983
26	Jun 20 1983		Petition GRANTED. *****
27	Jul 29 1983		Brief of petitioner McDonough Power Equip., Inc. filed.
28	Jul 29 1983		Joint appendix filed.
30	Aug 12 1983		Order extending time to file brief of respondent on the merits until September 19, 1983.
31	Sep 19 1983		Brief amicus curiae of Southern Union Company filed.
32	Sep 19 1983		Brief of respondents Billy G. Greenwood, et al. filed.
33	Oct 11 1983	D	Motion of Sheila Brewer for leave to file a brief as amicus curiae, out-of-time, filed.
34	Oct 14 1983		CIRCULATED.
35	Oct 24 1983		SET FOR ARGUMENT. Monday, November 28, 1983. (1st case) (1 hour)
36	Oct 31 1983		Motion of Sheila Brewer for leave to file a brief as amicus curiae, out-of-time, DENIED.
37	Nov 14 1983	X	Reply brief of petitioner McDonough Power Equip., Inc. filed.
38	Nov 28 1983		ARGUED.